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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 732

CATHERINE JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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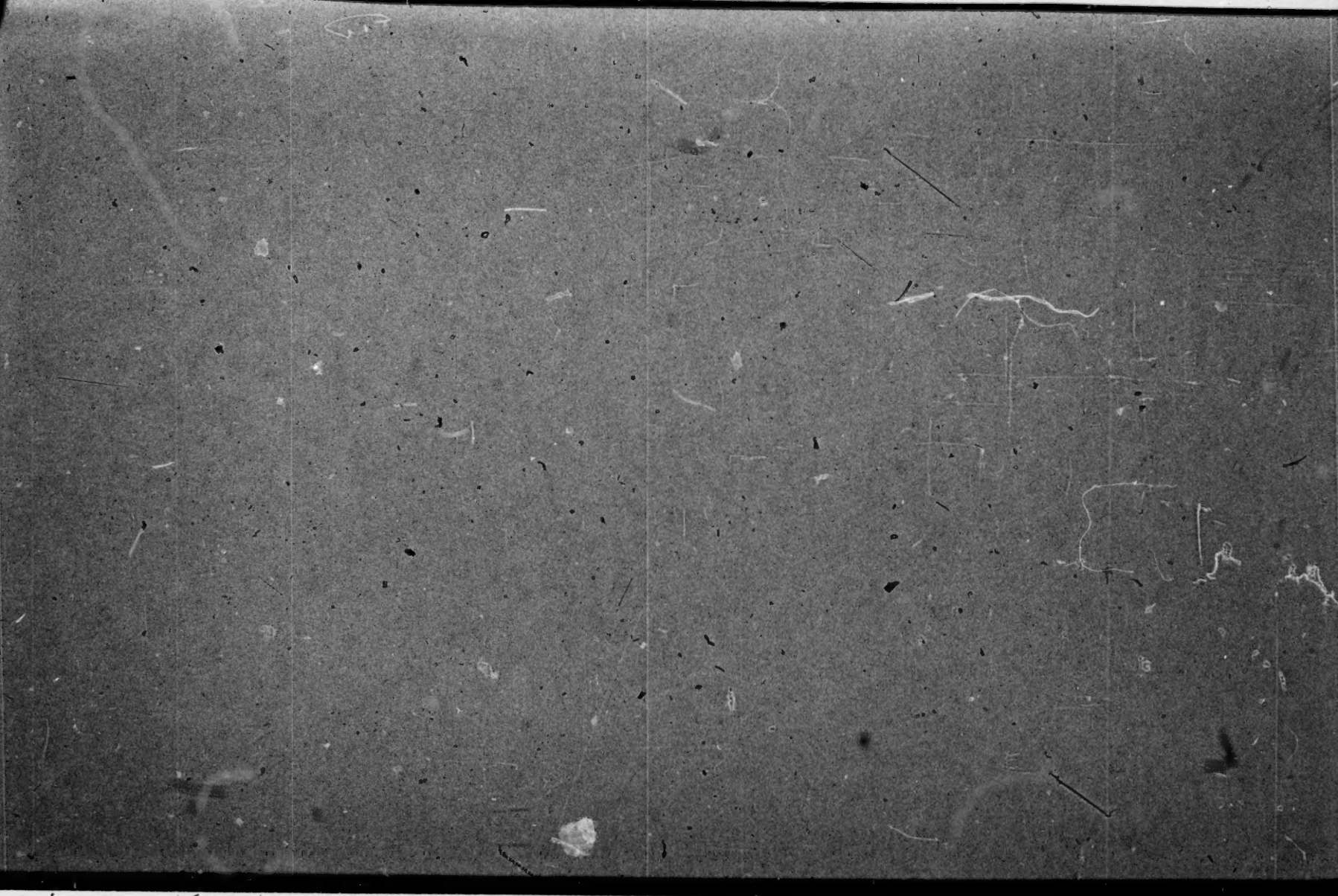

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. _____.

CATHERINE JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 19, 1969.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at ____ F.2d, ____ and is reproduced as Appendix A hereto. The opinion of the District Court is unreported and is reproduced as Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals (Judge O'Sullivan dissenting) (Appendix A *infra*) was entered on June 19, 1969. A timely petition for rehearing containing a suggestion of rehearing *en banc* was denied by a equally divided court on September 16, 1969 (Judges O'Sullivan, Celebrezze, Peck and McCree voted for granting the motion; Chief Justice Phillips and Judges Weick, Edwards and Combs voted to deny it). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is a defendant indicted for perjury denied a fair trial when despite timely pretrial motion showing particularized need therefor the District Court refuses her attorney access to the grand jury testimony of the persons whose testimony brought about her indictment for perjury.

2. When a defendant is charged with having committed perjury before a grand jury, and in trial a transcript of her testimony before the grand jury is admitted into evidence, is defendant deprived of a fair trial when the trial judge refuses access to such admitted exhibit to the jury during deliberations, notwithstanding the jury thrice requested it in order to determine certain crucial factual questions.

3. Are a defendant's rights violated when an F.B.I. agent testifies as to alleged inculpatory statements made by her in an interview sought and conducted in the absence of counsel for defendant, after a defendant has testified before a grand jury and she is already virtually a defendant in a criminal case.

4. When a defendant is indicted for perjury committed before a grand jury, after a grant of immunity under the Federal Communications Act, and neither the indictment, the evidence nor the facts show that any investigation under the Communications Act was in progress when the defendant testified, has there been the required showing of materiality; or have her Fifth Amendment rights been violated, or due process been offended, so as to invoke the court to strike down a conviction grounded in such improperly compelled testimony.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statutory and constitutional provisions involved are UNITED STATES CONSTITUTION AMENDMENT V, 18 U.S.C. 1621, 47 U. S. C. secs. 203, 501, and 409(l); and are reproduced in Appendix C (*infra*) pp. 64-67.

STATEMENT OF THE CASE.

Petitioner was charged in a one count indictment with the crime of perjury, 18 U.S.C. 1621.*

On January 24, 1966, Petitioner was subpoenaed before a grand jury and interrogated with respect to her affidavit filed in the case of *United States v. James R. Hoffa,* in which affidavit Petitioner claimed that she had engaged in acts of sexual intercourse with certain members of the sequestered Hoffa jury during the Hoffa trial. Before the grand jury, Petitioner claimed her Fifth Amendment privileges (R. 51), and was thereupon brought before the United States District Judge. The Government represented that Petitioner's testimony was sought in connection with an investigation of possible Communications Act violations, and that it consented pursuant to Sec. 409(l) of such Act (47 U.S.C. 409 (l)), to grant Petitioner immunity with respect to any testimony so elicited from Petitioner.

The Government's contention that it was entrained on a Communications Act violation was erected on the thesis that taken together Sec. 203(C) and 501 of the Communications Act (47 U.S.C. 203(C), 501) make it illegal for a telephone company to grant service in violation of the tariff required to be filed by the telephone company; and

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* The Indictment is reproduced in the District Court's Opinion, *infra* App. B at pp. 38-39.

that the tariffs so filed provided that telephone service should not be installed in violation of law. The Government then claimed that some of the investigative thrust of the questions directed at Petitioner was aimed at determining if any of those who procured defendant's affidavit or she, herself, used the telephone in the creation of her affidavit and therefore a Communications Act violation would be shown should the affidavit prove to be false or fraudulently procured (see R. 99-110). Over her objection, Chief Justice Taylor ordered the Petitioner to answer the questions propounded (R. 124-5).

Thereafter, the interrogation of Petitioner proceeded before the grand jury. Petitioner was given the choice of either answering the Government's questions or enduring a summary commitment for contempt, *despite the fact that none of the inquiries propounded in any way involved violation of the Federal Communications Act* (R. 132-372), the sole statute under which Petitioner was compelled to testify. Petitioner again testified to her sexual relations with members of the *Hoffa* jury (Jurors Link, Curbow and Bonner).

The foregoing events took place on January 24 and 25, 1966. More than a year later, on March 24, 1967, the grand jury handed up a single count indictment charging Petitioner with perjury in the responses coerced from her before the grand jury in that she testified she had sexual intercourse during the *Hoffa* trial with sequestered jurors, Link and Curbow.

The indictment itself failed to allege that the grand jury was conducting an inquiry into the possible Communications Act violations, and alleged only an inquiry into bribery, obstruction of justice, perjury and other Federal criminal statutes (App. A, pp. 21-22). On trial, the grand jury foreman stated that the investigation was made under the bribery, perjury, and obstruction statutes

"among other things," but did not mention the Communications Act (R. 299).

Between the time of her grand jury testimony and the return of the indictment, Petitioner was visited at her home by F.B.I. Agent Buol who testified over objection (R. 306) that after insisting her affidavit and testimony were true, Petitioner, in response to his suggestion that if there was error in her affidavit there was still time to straighten the matter out, (sic) replied, "yes, I know about perjury, five years or $2,000.00," (R. 310-311).

Upon arraignment, Petitioner entered a plea of not guilty. Counsel seasonably sought to procure her grand jury testimony, and the grand jury testimony of the jurors Petitioner had identified as those persons with whom she had had sexual intercourse. The motion was granted by the District Court as to Petitioner's grand jury testimony. *But the Court denied Petitioner's motion to provide her in advance of trial with the grand jury testimony of jurors Link, Curbow and Bonner.* The Government significantly failed to call Bonner as a witness during the trial.

The Government sought to establish its case (1) by testimony of the United States Marshals indicating that security arrangements respecting the *Hoffa* jury were such as to preclude a visit by any unauthorized person to the tenth floor of the Reed House Hotel, Chattanooga, Tennessee, where the jury was sequestered; (2) the testimony of jurors Link and Curbow that they had not in fact had relations with Petitioner and (3) the testimony of F.B.I. Agent Buol.

With respect to the first category, no summary will be made here as Petitioner does not seek certiorari on the issue of sufficiency. It suffices to state here that a real and substantial question was raised below on the question of sufficiency, and we believe that question was wrongfully decided below.

With respect to the second category, i.e. the testimony of jurors Link and Curbow, each denied having had relations with Petitioner but admitted he did not know what the other had done during the *Hoffa* trial. It was shown that Curbow had engaged in various extra marital activities; and *had made inculpatory statements respecting his "social activities" during the Hoffa trial to a "girl friend"* at her home (R. 495).

Although Petitioner testified flatly before the grand jury that she had sexual relations with jurors Link, Curbow and Bonner, Bonner was not called as a witness by the Government at the trial and the Government resisted Petitioner's efforts to procure the grand jury testimony of all three. The evidence included the transcript of Petitioner's testimony before the grand jury in which she testified positively that she had had relations with the three jurors named, the details of her getting to the tenth floor of the Reed House and all related circumstances (R. 132-372; Exhibit 2 admitted in evidence R. 130).

While the trial judge, and the majority opinion in the Court of Appeals contended that the District Judge likely thought that Exhibit 2 had been offered only for identification purposes (App. A, p. 26), the record is plain that at R. 125, the exhibit was offered for identification, and at R. 130 it was offered and admitted into evidence.* During argument each side read from and argued the

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* The trial transcript at R. 125 states as follows: "Mr. Mittler: Government's Exhibit 2 for identification is the grand jury testimony of one Catherine Johnson. I would like that marked Government's Exhibit 2 *for identification.* (Thereupon, the document referred to above was received in evidence and marked Government's Exhibit 2 for identification.)"

At R. 130, appears: "Mr. Mittler: * * * Your Honor, at this time the Government *would offer into evidence* Government's Exhibit 1, Government's Exhibit 2, 2a, 2b and 2c. Mr. McClellan: To which the defendant has no objection. The Court: Allow them to be filed. (Government's Exhibits 1, 2, 2a, 2b and 2c were marked for identification and received into evidence.)"

contents of this exhibit to the jury. Indeed, if this exhibit was not in evidence the Government's case would fail as it was the sole evidence offered or admitted as to the alleged perjury—no other testimony was offered as to what it was that Petitioner had said.

During the course of deliberations, the jury on three separate occasions requested Exhibit 2 which had been received in evidence by agreement of the Petitioner and the Government and which exhibit contained Petitioner's testimony before the grand jury. Initially the Government did not object to the jury receiving such exhibit (R. 616); and the court stated that he had assumed that counsel considered "[t]he entire exhibit (to be) in evidence without objection * * *." (R. 617). Nonetheless, the court declined to make such exhibit available to the jury (R. 625-6). Subsequently, the jury returned and again requested orally the transcript of such testimony. Again the court declined to make Petitioner's grand jury testimony which had been received in evidence for all purposes as Exhibit 2 available to the jury (R. 630).

On yet a third occasion the jury returned and requested that portion of Exhibit 2 which indicated how the Petitioner got to the tenth floor of the Reed House (R. 641). Although the answer to this question was contained in Petitioner's grand jury testimony and was crucial to determination of the case, the court again declined to make the exhibit available to the jury.

The jury returned a verdict of guilty. Seasonable motions for new trial were filed, and overruled in a memorandum opinion filed by the District Court. Timely appeal followed, the court below affirming in a two to one decision with a vigorous dissent by Judge O'Sullivan. Petitioner's motion for rehearing containing suggestion for rehearing *en banc* was denied by an equally divided court, four to four.

REASONS WHY THE WRIT SHOULD BE GRANTED.

1. Deprivation of Fair Trial—by the Refusal of the Trial Court to Permit Inspection by Defense Counsel of Grand Jury Minutes of the Testimony of Those Whose Testimony Brought About Defendant's Indictment.

The trial court denied Petitioner's pretrial motion for the grand jury testimony of her accusers Link and Curbow. The indictment specifically stated that the perjury with which Petitioner was charged was that she had falsely testified before the grand jury that she had had sexual relations with Link and Curbow. Notwithstanding, Petitioner's counsel's claim that inspection of the Link-Curbow grand jury testimony was material to the preparation of Petitioner's defense, the trial court ruled that no particularized need had been shown. The trial court further ruled that even if particularized need had been shown, the grand jury testimony could be used only "in a manner consistent with the Jencks Act" (See O'Sullivan, J., dissenting, below, App. A, pp. 29-37). As argued in the dissent of Judge O'Sullivan, it is believed that these trial court rulings (affirmed below) are in error.

As also noted in the dissent, the decision of the District Court is in direct conflict with decisions in other circuits, see *United States v. Youngblood*, 379 F.(2) 365 (2d Cir. 1967); *Cargill v. United States*, 381 F.(2) 849 (10th Cir. 1967); and *National Dairy Products Corp. v. United States*, 384 F.(2) 457 (8th Cir. 1967); and is in apparent conflict with the decision of this Court in *Dennis v. United States*, 384 U.S. 855 (1966). The decisions of these other circuits have interpreted *Dennis* substantially in the same manner as Judge O'Sullivan has.

Clearly the question presented is of importance in the administration of Federal Criminal Justice and is of a recurring nature: (The decision in *Melton v. United*

States, 398 F.2d 321 (10th Cir. 1968) postdating argument here; the four to four decision in denying rehearing here; see also *Gibson v. United States,* 403 F.2d, 166 (D.C. Cir. 1968); *United States v. Amabile,* 395 F.2d, 47 (7th Cir. 1968), and the cases cited above).

The key question was indeed ruled upon by the trial court here in direct contradiction with the philosophy of this Court as expressed in *Dennis, supra,* that (1) "the determination of what may be useful to the defense can properly and effectively be made only by an advocate," 384 U.S. 1875 Cf. *Alderman v. United States,* 394 U.S. 165 (1969) and that; (2) "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact," 384 U.S. at 873. Production of the statements of Link and Curbow at the time of trial under Jencks Act procedures was not what the Petitioner sought or required to properly prepare her case. Such production to be effective must come in the investigative stage of the trial, rather than at trial when it can only be utilized in cross-examination. Important as cross-examination is, the right to properly prepare a case in advance of trial cannot be denied to defense counsel in a criminal case.

2. Deprivation of a Fair Trial—by the Trial Court's Refusal to Permit the Jury to Inspect the Transcript of Petitioner's Grand Jury Testimony Which Was in Evidence.

Petitioner's grand jury testimony was admitted in evidence for all purposes. The trial court's position, and that of the court below, i.e. that the trial judge likely thought this exhibit had been introduced for identification only, is undercut by the plain wording of the record. The decision of the trial court is in apparent conflict with the thinking of Judge Wyzanski in *Kemler v. United*

States, 133 F.2d 235, 240 (1943). Obviously, the jury in requesting the testimony was attempting to reconcile a disagreement or a question between the jurors as to what Petitioner had in fact testified to, since only portions of her grand jury testimony had been read to them during the course of argument. *Hill v. McQueen,* 204 Okla. 394, 230 P.2d 483, 22 A.L.R.2d 1220. In such circumstances withholding from the jury evidence which formed the underpinning of the prosecution, in the teeth of three separate requests therefor by the jury was clearly abuse.

Where exhibits have been received in evidence it is the majority rule that it is proper for them to be taken to the jury room. See *Jensen v. Dikel,* 69 N.W.2d 108 (Minn.); *Rockland Bleach and Dye Works Company v. H. J. Williams Corp., Inc.,* 219 A.2d 48 (Md. 1966); *Ridgeway v. Crum,* 98 N.E.2d 394, 343 Ill. App. 12; *Wacker-Wabash Corp. v. City of Chicago,* 112 N.E.2d 903; *Forcier v. Hopkins,* 110 N.E.2d 126; *Dallas Railway & Terminal Company v. Durkee,* 193 S.W.2d 222; *Moody v. Vickers,* 79 Ohio App. 218.

To whatever extent that taking of exhibits to the jury room is discretionary with the trial court, see *Murray v. United States,* 130 F.2d 442, the denial to the jury of Exhibit 2 here was a gross abuse of discretion; in effect denying to the jury a key portion of the evidence in the case. The court instructed the jury that it was their duty to decide the case upon the evidence introduced in the case (R. 642); but although Exhibit 2 fell into this category, indeed was critical evidence in the case, the jury was effectively foreclosed from examining it. Plainly, as Judge Wilson commented, he and both counsel thought that the exhibit had been introduced into evidence for all purposes (R. 617).

Failure of counsel to read the lengthy exhibit orally from the stand should not foreclose the jury's considera-

tion of it in the course of its deliberations. *Criminal trials are not games of chance to be determined upon expertise of counsel, nor on technical adherence to established formulae in presentation.* Particularly in the light of the thrice repeated demand by the jury, the crucial evidence which they requested should have been made available to them. The courts refusal left the jury in the posture of having to speculate on what it considered a crucial point. The denial offends due process, and the proper administration of criminal justice.

The practice of introduction of written papers without reading them to the jury is not uncommon. Thus the question is one which will recur, and the voice of this Court under its supervisory powers will establish a guide for counsel in the conduct of criminal trials.

3. Denial of Fair Trial by the Introduction of Testimony of an F.B.I. Interview of a Virtual Defendant in the Absence of Counsel.

A reading of the special grand jury proceedings and the testimony of Catherine Johnson before the grand jury (R. 42-327) makes it plain that by the time Catherine Johnson had concluded her grand jury testimony she was in the position of being a virtual defendant. Indeed, by that time the Government had already taken the position in the *Hoffa* case that the affidavits furnished by Petitioner and others in the *Hoffa* case were false, the motion of Hoffa had been denied, and the trial judge there had dismissed the third motion for new trial in the *Hoffa* case and branded as patent perjury the affidavits upon which that motion for new trial in *Hoffa* was grounded.* Judge O'Sullivan comments (App. A, p. 30) that with respect

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* The trial judge both in *Hoffa* and in the instant case was the same, The Honorable Frank W. Wilson.

to Petitioners compelled testimony before the grand jury, "[W]e can only speculate whether this procedural device was part of a government plan to obtain cross examination of this young woman before formal accusation of her would foreclose such activity."

The F.B.I. against this backdrop, and some months after Petitioner had testified before the grand jury, came to see her, obviously seeking her recantation (R. 310-311).

Initially, the testimony of F.B.I. Agent Buol should have been rejected on ancient and traditional doctrines. His interview with Petitioner did not develop any real admission from Petitioner. Instead, Petitioner admittedly grounded her refusal to change her testimony upon the fact that her grand jury testimony, and her previous affidavit, were true. The technique of placing an F.B.I. agent on the stand, and seizing upon some minor aspect of an interview between the F.B.I. agent, and a defendant as being tantamount to an admission, thus introducing testimony of an F.B.I. interview is offensive to due process and the proper administration of criminal justice. The technique is but subterfuge, purposefully demonstrating to the jury that the prestigious and skilled F.B.I. had made determination of Petitioner's guilt; thus effectively invading the jury's province.

Moreover, in the context of the present situation, the rule erected in *Massiah v. United States,* 377 U.S. 201 (1963), is offended. It is plain that here the adversary system had already begun to function. In numerous other cases where the defendant had been placed in the position of virtual defendant, the courts have held that the doctrine enunciated by *Massiah* precluded the introduction of interview testimony obtained in the absence of counsel. See *People v. Wallace,* 234 N.Y.S.2d 579; *People v. Waterman,* 9 N.Y.2d 561, 565, 175 N.E.2d 445, 448;

People v. Davis, 241 N.Y.S.2d 172; *People v. Rodriguez,* 229 N.Y.S.2d 343; *People v. Meyer,* 227 N.Y.S.2d 427 and *People v. Robinson,* 224 N.Y.S.2d 709. Indeed, the Sixth Circuit long ago postulated a rule extending *Massiah* to a person who is "virtually in the position of a defendant," *United States v. Luxenberg,* 374 F.2d, 241 (6th Cir. 1967), *Stanley v. United States,* 245 F.2d, 427 (6th Cir. 1957).

The question of when and if *Massiah* rights came into play pre formal indictment, but after the adversary system had begun to operate, is one of a recurring nature and one which can and should be clarified.

4. Deprivation of Fair Trial by Requiring Testimony Before the Grand Jury Not Material to Any Investigation Properly Being Conducted, and in Violation of Petitioner's Constitutional and Statutory Rights.

Neither the indictment, nor the testimony of the grand jury foreman at the time of trial claimed that the grand jury at the time the defendant testified before it was engaged in an investigation of possible violations of the Communications Act. Yet, it was only if such an investigation was being conducted, that the defendant could have been either compelled under Sec. 409(l) of the Act to testify, or cloaked thereunder with immunity from prosecution. It would therefore appear that such testimony as she gave could only have been taken and ordered in connection with a Communications Act investigation. It can make no difference that other matters were of concern to the grand jury. Her testimony was only compelled to the extent material to a Communications Act violation; and *unless material to the matter under investigation the testimony cannot be the basis for a perjury conviction* (18 USC 1621). The indictment was defective in failing to allege such an investigation; and the Govern-

ment's proofs in failing to show such an investigation was fatally defective (41 *Am. Jur.*, Perjury, sec. 42). This requirement was held to be one of Constitutional dimension in *State v. Popolos,* 103 A.2d 511 (Me.).

Moreover, the compelling of Petitioner's testimony before the grand jury violated her Fifth Amendment right against self-incrimination unless the compelling of such testimony was authorized under Section 409(l) of the Communications Act; otherwise her coerced testimony in which the charge is grounded was unconstitutionally obtained, and therefore cannot be the foundation of a perjury charge, 27 *ALR* 151; *U.S. v. Cleary,* 164 F. Supp. 328 (1958); rev'd 265 F.2d 459 (the appellate court holding on the facts that the testimony was there voluntarily given); *U. S. v. Bell,* 81 Fed. 830 (C.C. Tenn. 1897); *U. S. v. Gaines,* 156 F. Supp. 467, aff'd 258 F.2d 530, cert. den. 359 U.S. 937.

At one time, the United States had a general immunity provision but the Congress saw fit to repeal that provision. The limited immunity provisions existing today are the will of the Congress. The "grant of immunity" to Petitioner in her grand jury appearance here, if inferentially approved by denial of this petition, foreshadows erection of a course of evasion of that intent.

The cases relied on by the Government, *U. S. v. Andrews,* 342 F.2d 207; *Marcus v. U. S.,* 310 F.2d 143, etc., are not apposite. In those cases the courts found that obtaining telephone service for an illegal purpose violated the Communications Act; but those were not cases in which there was casual, incidental use of telephone service already installed. In those cases, telephone *service was obtained* for large scale illegal purposes (bookmaking). In this case, the possible casual use of a telephone (not the obtaining of telephone service, i.e., procuring its in-

stallation), became the tent under which the Government patently without cause claimed a possible Communications Act violation and invoked 409(l). If the technique is permitted, Sec. 409(l) for practical purposes could become a general immunity statute. It would be the rare case today in which the Government could not inquire into the possible use of the telephone in furtherance of a crime. As already quoted (*supra*, p. 12) the dissent was disturbed by this transparent "procedural device" (App. A, p. 30). This plain evasion is not only violative of due process, but should be scored as repugnant to our sense of that which a government may do in seeking conviction of crime, or, as here, procuring improperly the activity it claims as criminal.

CONCLUSION.

For all of the above reasons advanced, the Petition should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided June 19, 1969.)

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

EDWARDS, Circuit Judge. Appellant Catherine Johnson was indicted, and was convicted of perjury in violation of 18 U.S.C. § 1621 (1964) after a jury trial before the United States District Court for the Eastern District of Tennessee, Southern Division. She was sentenced to three years in the federal penitentiary.

In the aftermath of the trial and conviction of James Hoffa,[1] a third motion for new trial on his behalf was filed. Attached thereto (among others) was an affidavit signed by appellant on August 15, 1965, under the name of Patsy Jo Harris. In this affidavit appellant alleged that during the Hoffa trial in Chattanooga, Tennessee, and while the jury was sequestered on the 10th floor of the Read House Hotel under guard of United States Marshals, she was procured to render professional services as a prostitute to four members of the jury.

Subsequently, a federal grand jury was convened to investigate violations of the federal criminal laws in relation to the Hoffa new trial motions. Appellant was subpoenaed before the grand jury and on being questioned declined to answer on Fifth Amendment grounds. She

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[1] *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965) (conviction affirmed and first motion for new trial denied), *aff'd*, 385 U.S. 293, *reh. denied*, 386 U.S. 940 (1966); 376 F.2d 1020 (6th Cir.) (second motion for new trial denied), *cert. denied*, 389 U.S. 859 (1967); 382 F.2d 856 (6th Cir. 1967) (third motion for new trial denied), *cert. denied*, 390 U.S. 924 (1968); 398 F.2d 291 (6th Cir. 1968) (fourth motion for new trial denied), *vacated and remanded sub nom., Giordano v. United States*, 37 U.S.L.W. 3353 (U.S. March 25, 1969). (No. 546)

was thereupon brought before a United States District Judge and granted immunity in relation to her testimony under the immunity provision of the Federal Communications Act, 47 U.S.C. § 409(*l*) (1964). Appellant thereupon testified, generally reiterating the allegations in her affidavit and identifying certain jurors and United States Marshals involved in the Hoffa trial from photographs.

On cross-examination she was indefinite as to her identification of two of the named jurors, but she was positive in asserting that she had sexual relations with jurors Curbow and Link several times on the 10th floor of the Read House Hotel during the course of the Hoffa trial. And she was positive in identifying a particular bellboy, Seymour Ball, as having procured her services, and a particular United States Marshal, James Kemp, as having escorted her to and from the 10th floor.

On March 24, 1967, the grand jury handed down a single-count indictment charging that appellant committed perjury when she testified before the grand jury that she had had sexual relations with jurors Curbow and Link during the course of the Hoffa trial.

At the trial the prosecution introduced the record of appellant's grand jury testimony and then called jurors Curbow and Link and Marshal Kemp. Each juror flatly denied ever having seen appellant (before the convening of the grand jury) and specifically denied having sexual relations with her during the course of the Hoffa trial. Marshal Kemp also testified that he had never seen or met appellant until the perjury trial. He denied knowing Seymour Ball and also specifically denied taking appellant to the 10th floor of the Read House Hotel during the Hoffa trial.

The prosecution called two other marshals—one who had overall and one who had direct supervision over the

arrangements for sequestration of the Hoffa jury. Their testimony was that the 10th floor of the Read House Hotel had been carefully selected because its physical characteristics lent themselves to protection of the jury; that during the trial the hotel elevator operators generally did not go to the 10th floor (the top floor) except on order of a marshal; that 20 to 30 marshals were employed on three shifts, 7 days a week to be with the jury at the Read House Hotel at all times; that at least three were on duty at all times when the jury was in the hotel, with one of them stationed at each end of the long corridor at the exit doors and the other stationed midway in the corridor across from the two elevators; that each juror (including Curbow and Link and four married women) had individual rooms on this floor, and that anyone going onto the floor could be seen by the three marshals on duty.

During the trial of this case the jury was taken to the 10th floor of the Read House Hotel to inspect the physical layout described above.

Appellant did not testify (as, of course, she had a clear right not to do). Seymour Ball was not called as a witness at this trial, although testimony showed his presence in Chattanooga in company with a Teamsters Union agent, Charles O'Brien.

There was no witness called at trial by appellant who offered direct support for the statements which occasioned the perjury charges. Three witnesses for the defense did, however, testify to facts which, if believed by the jury, would have tended to dispute elements of the prosecution's case and raise a reasonable doubt about appellant's guilt.

Ezell Ervons, who had been a bellboy at the Read House Hotel during the Hoffa trial, testified that he had been approached by a man whom he believed to be a United States Marshal and asked about a girl; that he had

one; and that she went to the 10th floor of the hotel and subsequently came back and paid him. He identified the prostitute only by the name of Jo. He said that Jo was not the appellant; that he had never seen Jo before or since, and he did not identify the marshal or the juror. He testified that after leaving the Read House Hotel he had worked on a job in Atlanta, Georgia, which Teamster agent O'Brien had secured for him.

Venette Weaver testified that in 1967 (three years after the Hoffa trial, but before this one) she had been rooming with a Mrs. Odom, whom Hoffa trial juror Curbow had been dating, and that in her presence a discussion between Curbow and Mrs. Odom had taken place. Her testimony was:

> "Q. (Interposing) Who is she?
>
> A. Mrs. Odom. Asked how he felt to have sexual intercourses with a girl younger than his own daughter.
>
> Q. What, if anything, did Mr. Curbow say in response to that?
>
> A. He said that, 'She will have to be able to identify me.'
>
> Q. Was anything else said?
>
> A. No, sir.
>
> Q. With respect to this?
>
> A. Huh-uh.
>
> Q. And at that time I believe you testified you were sharing the same residence with—
>
> A. (Interposing) Yes, she was sharing the residence, we were sharing the residence together.
>
> Q. That is, you and Mrs. Odom?
>
> A. Yes.
>
> Q. And Mr. Curbow had been dating her?
>
> A. Yes."

Curbow on cross-examination denied making such a statement. Mrs. Odom did not testify.

Troyce Maydean Henry testified that in company with United States Marshal Reidy she attended a party on the 10th floor of the Read House Hotel on the night the Hoffa trial ended. She testified that there were other women there. She also testified that she had seen no jurors there nor had she seen the appellant. She also testified that during the Hoffa trial she saw a man whom she later identified from photographs as juror Curbow at a V.F.W. hall on one occasion and at the Alamo Plaza Motel on another. She testified that she had never met this man before or since; that the identification was made approximately two years after the Hoffa trial and a year and a half after she had failed to identify anyone when she had first been shown the pictures of the Hoffa jury. She testified that she had originally gone to talk with Teamster Union officials at the behest of her brother-in-law, whom she identified as working for the Teamsters.

We have gone this much into the factual detail of this trial because of appellant's insistence in her first appellate question that she was entitled to have her motion for acquittal granted by the District Judge because of the failure of government proof to meet required legal standards.

There is, of course, no doubt that the prosecution does have a "unique and stringent burden of proof" in perjury cases. *Spaeth v. United States*, 232 F.2d 776, 777 (6th Cir. 1956). To sustain a perjury conviction there must be at least two witnesses or one witness corroborated by independent circumstances. *Weiler v. United States*, 323 U.S. 606 (1945). Appellant argues vigorously in this case that jurors Curbow and Link by denying any contact with appellant cannot be regarded as meeting the "two witness" rule, since neither could support the other's denial. Assuming arguendo the validity of this contention (*But see*

May v. United States, 280 F.2d 555 (6th Cir. 1960)), we believe there is ample independent corroboration. Appellant's story charged that United States Marshal Kemp escorted her to the 10th floor of the Read House Hotel on each occasion when she had sexual relations with Curbow and Link. Kemp positively denied doing any such thing. His testimony must be regarded as independent corroboration of that of Curbow and Link. So, too, is the mass of testimony pertaining to the physical and personnel arrangements made by the United States Marshal to protect this jury.

We conclude that the District Judge was correct in denying both the motion for acquittal at the close of proofs and the motion for new trial after the jury verdict of guilty. The factual issues were for jury determination.

Appellant also attacks the indictment as fundamentally defective because it failed to employ the word "willfully" which is contained in the perjury statute, 18 U.S.C. § 1621 (1964).[2] The District Judge rejected this argument because he held that the language of the indictment [3] sufficiently alleged willfulness. See *Finn v. United*

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[2] "Whoever, having taken an oath before a competent tribunal . . . that he will testify . . . truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both . . . ." 18 U.S.C. § 1621 (1964).

[3] "1. On or about January 24, 1966, in the Eastern District of Tennessee, a competent tribunal, that is, a Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Eastern District of Tennessee, was conducting an inquiry to determine among other things whether there had been committed in the Eastern District of Tennessee violations of 18 USC 201 (Bribery), 18 USC 1503 (Obstruction of Justice), 18 USC 1621 (Perjury), and other Federal

(Continued on following page)

States, 256 F.2d 304 (4th Cir. 1958). While we agree with this view, we affirm also on the ground that Rule 7(c) of the Federal Rules of Criminal Procedure greatly liberalized pleading practice so that the citation of the statute itself served to allege willfulness. *Cochran v. United States,* 336 F.2d 799 (6th Cir. 1964), *cert. denied,* 380 U.S. 945 (1965); *United States v. Roberts,* 296 F.2d 198 (4th Cir. 1961), *cert. denied,* 369 U.S. 867 (1962); *Ochoa v. United States,* 167 F.2d 341 (9th Cir. 1948).

And the District Judge took pains to charge the jury fully and carefully on the issue of willfulness.

Nor do we find any lack of specificity in the indictment. Appellant was advised by its terms of the exact charge which she faced.

As we understand appellant's contention IV, it is that appellant could not be prosecuted for perjury because the

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(Continued from preceding page)

criminal statutes, said inquiry being in a case in which a law of the United States authorized an oath to be administered.

"2. It was material to this Grand Jury Inquiry to ascertain, among other things, whether Catherine Johnson (also known as Patsy Jo Harris) had sexual intercourse with William Link and John Curbow, who were petit jurors in the trial of *United States v. James R. Hoffa, et al.,* (Criminal No. 11,989), during said trial, and while said petit jurors were sequestered on the tenth floor of the Read House Hotel during the said trial.

"3. On or about January 24, 1966, the defendant, Catherine Johnson, having duly taken an oath before the said Grand Jury that, as a witness before said Grand Jury, she would testify truly, did, then and there, state material matters which she did not believe to be true, to wit, she stated that she had had sexual intercourse with the aforesaid William Link and John Curbow during the aforesaid trial on the tenth floor of the Read House Hotel.

"4. The aforesaid testimony of Catherine Johnson, as she then and there well knew and believed, was not true in that Catherine Johnson did not have sexual intercourse with either the aforesaid William Link or the aforesaid John Curbow during the aforesaid trial on the tenth floor of the Read House Hotel.

"In violation of Title 18, United States Code, Section 1621."

questions to which she is alleged to have given false answers were beyond the scope of and not materially related to the Federal Communications Act under which she was granted immunity.

The grand jury foreman testified at this trial that perjury was among the subjects which the grand jury was charged with investigating. We think it is much too late to doubt that the grant of immunity to appellant was co-extensive with the relevant answers she gave to the questions asked under the grant of immunity. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

We believe that appellant's Fifth Amendment rights were amply protected if she told the truth under the grant of immunity. But it is relevant to note that the statute expressly excepted perjury committed while she was testifying under the grant of immunity.[4] *Cf. Glickstein v. United States*, 222 U.S. 139 (1911).

We also feel that the inquiries directed to appellant taken in context of the investigation were substantially related to possible violations of the Federal Communications Act.

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[4] "(*l*) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, *except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying*." 47 U.S.C. § 409 (*l*) (1964). (Emphasis added.)

In *United States v. Harris*, the Second Circuit said:

"Section 409(*l*) of Title 47 of the United States Code extends immunity for testimony given 'in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of [the Federal Communications Act].' Harris contends that he should have been granted the right to summon several witnesses, including one or two members of the grand jury, to establish that the grand jury's investigation did not pertain to alleged violations of the Communications Act. We do not agree. The extent in general to which a witness may inquire into the subject matter of a grand jury investigation is severely circumscribed, in light of the secrecy in which grand jury proceedings have traditionally been held. United States v. Levine, 267 F.2d 335, 336-337 (2 Cir. 1959). See Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919). In any event, we find that the government sufficiently established that the grand jury's investigation fell within the confines of § 409 (*l*).

"First, the August 7 subpoena explicitly stated that the grand jury was engaged in investigation of possible violations of provisions of the Communications Act. Second, the government's counsel represented to the court that the grand jury was investigating possible violations of the Communications Act. Finally, the questions themselves revealed a substantial link with those sections of the Communications Act which prohibit any person from causing a telephone company to violate any provision of the Act. Cf. In re Bart, 113 U.S. App. D.C. 54, 304 F.2d 631, 637 (1962)." *United States v. Harris*, 334 F.2d 460, 462-63 (2d Cir. 1964), *reversed and remanded on other grounds*, 382 U.S. 162 (1965), *aff'd on remand*, 367 F.2d 826 (2d Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967).

Accord, *Marcus v. United States*, 310 F.2d 143 (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963); *In re Grand Jury*

Investigation of Giancana, 352 F.2d 921 (7th Cir.), *cert. denied,* 382 U.S. 959 (1965).

We agree with this view and feel that it is directly applicable to our instant case.

Further, even if a particular question was irrelevant to Federal Communications Act purposes, we profoundly doubt that this fact would grant appellant a "license to commit perjury." *Glickstein v. United States,* 222 U.S. 139, 143 (1911). Of course, in this case we have no occasion to consider what might be the situation if appellant had refused to answer on grounds of irrelevance. *See Testa v. United States,* 326 F.2d 730 (3d Cir.), *cert. denied,* 376 U.S. 931 (1964); *In re Bart,* 304 F.2d 631 (D.C. Cir. 1962).

We have read with care the circumstances under which appellant was questioned by an FBI agent. Plainly, this was not "in-custody" interrogation which would demand the full panoply of the *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436 (1966). Appellant was not under indictment at the time. *Cf. Massiah v. United States,* 377 U.S. 206 (1964). She was warned of her basic constitutional rights and there were no threats or inducements, nor was there any coercion. *Cf. Davis v. North Carolina,* 384 U.S. 737 (1966).

Appellant also cites as reversible error four instances where the District Judge refused to admit evidence. In one instance the evidence would have tended to show possible misconduct on the part of juror Curbow with a different woman at a different time and place. Other rejected testimony would have tended to charge some of the United States Marshals with indiscreet conduct when off duty. The District Judge's analysis of this proffered evidence in his opinion denying appellant's motion for new trial justifies his rejection of the matters on grounds of irrelevance. His rulings were within the discretionary au-

thority of a trial judge and do not constitute prejudicial error. *See Kansas City Star Co. v. United States,* 240 F.2d 643 (8th Cir.), *cert. denied,* 354 U.S. 923 (1957); *United States v. Higgins,* 362 F.2d 462 (7th Cir. 1966); *United States v. Johnston,* 318 F.2d 288 (6th Cir. 1963); *Hardy v. United States,* 335 F.2d 288 (D.C. Cir. 1964).

We also feel that the District Judge's handling of the jury request for a portion of Exhibit 2 was within his judicial discretion. Obviously (although the record might be read differently) the District Judge thought that Exhibit 2 (a 372 page transcript of appellant's grand jury testimony) had been marked for purposes of identification and would be considered as admitted in evidence only when actually read into the record of the trial before the jury. Each side had without objection read portions of the transcript to the jury during closing argument. The jury asked to have reread a portion which had been read during the government's argument. It was the defense who objected to reading just that portion which the jury sought. The government in turn objected to giving the jury the whole 372-page transcript as defense suggested. We find no error prejudicial to defendant in the District Judge's ultimate refusal of the jury request. *See Caldwell v. United States,* 36 F.2d 738 (10th Cir. 1929), *cert. denied,* 281 U.S. 725 (1930); *Buckley v. United States,* 33 F.2d 713 (6th Cir. 1929); *Murray v. United States,* 130 F.2d 442 (D.C. Cir. 1942).

As to appellant's issue pertaining to her motion filed pre-trial for the entire grand jury transcript, we note that the District Judge granted the motion so far as it would pertain to appellant's own testimony, and then said as follows:

> "With respect to the defendant's motion for production of a transcript of the proceedings before the

> Grand Jury, including the testimony of William Link and John Curbow, the Court is of the opinion that the motion should be denied, except to the extent that the defendant is entitled to a copy of her testimony before the Grand Jury in accordance with Rule 16(a)(3), *Federal Rules of Criminal Procedure*. A disclosure of testimony before the Grand Jury may properly be obtained only upon a showing of 'particularized need' and then in a manner consistent with the Jencks Act. *Dennis v. United States*, 384 U.S. 855; *United States v. Procter & Gamble*, 356 U.S. 677."

No request for production of the grand jury testimony of government witnesses at trial for purposes of cross-examination was ever made. *Cf. Dennis v. United States*, 384 U.S. 855, 875 (1966); *United States v. Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967); *National Dairy Products Corp. v. United States*, 384 F.2d 457 (8th Cir. 1967), *cert. denied*, 390 U.S. 957 (1968).

Nor was there ever an attempt made to show a "particularized need" for this testimony. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, *rehearing denied*, 361 U.S. 855 (1959); *United States v. Hensley*, 374 F.2d 341, 352-353 (6th Cir.), *cert. denied*, 388 U.S. 923, *rehearing denied*, 389 U.S. 891 (1967). As to this issue we find no error.

We read the dissent as suggesting that pretrial discovery of grand jury proceedings be granted generally to defendants on a request stating that it is necessary for preparation for trial. This appears to us to be a far cry from the particularized need test in *United States v. Procter & Gamble, supra*. No such rule has previously been enforced in this circuit. *United States v. Barnes*, 313 F.2d 325 (6th Cir. 1963); *United States v. Hensley, supra*.

Nor has the suggested rule been adopted by the fed-

eral courts generally. *Walsh v. United States,* 371 F.2d 436 (1st Cir.), *cert. denied,* 387 U.S. 947 (1967); *Hanger v. United States,* 398 F.2d 91 (8th Cir. 1968); *United States v. Johnson,* 377 F.2d 180 (4th Cir. 1964).

Nor is it in our view consistent with the concern expressed by the United States Supreme Court for preserving the secrecy of grand jury proceedings. *Costello v. United States,* 350 U.S. 359 (1957); *United States v. Johnson,* 319 U.S. 503 (1943); *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958).

The rule suggested by the dissent would go far beyond the requirements of *Dennis v. United States,* 384 U.S. 855 (1966). In *Dennis* the United States Supreme Court held that production *at trial* of grand jury statements of government witnesses for purposes of cross-examination was required where defendants asked for such statements. The holding in the *Dennis* case was:

> "Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial." *Dennis v. United States, supra* at 875.

In our instant case, although, in our opinion, the trial judge suggested the proper procedure by his reference to the *Dennis* and *Procter & Gamble* cases,[5] no request for grand jury testimony was ever made at the trial for the purpose of cross-examination of government witnesses.

We do not find any showing in this record to suggest the existence of a *Brady v. Maryland* issue. *Brady v. Maryland,* 373 U.S. 83 (1963).

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[5] *Dennis v. United States,* 384 U.S. 855, 875 (1966); *United States v. Procter & Gamble Co.,* 356 U.S. 677, 683 (1958).

We have considered issues XII, XIII and XIV. All of these issues have been dealt with effectively in the District Judge's opinion and we affirm the reasoning and result contained therein.

The judgment of the District Court is affirmed.

O'SULLIVAN, Circuit Judge, dissenting.

The basis of my dissent is a view that defendant-appellant Johnson was denied a fair trial by the refusal of the District Court to allow her attorney access to the transcript of the grand jury testimony of two jurors in the Hoffa trial, Link and Curbow, whose testimony before the grand jury brought about her indictment for perjury.

Appellant, a prostitute, had sworn to an affidavit which recited that she had, on several occasions, furnished her services to some of the jurors who were considering, and ultimately joined in, the conviction of Hoffa and his co-defendants. Her affidavit, with others, was used to support a Motion for New Trial made by Hoffa and which charged serious misconduct by some members of the Hoffa jury while they were sequestered in a hotel in Chattanooga, Tennessee.

The basis for the perjury charge was not the affidavit that appellant had signed, but was her testimony before the grand jury. The indictment charged that the grand jury was,

> "conducting an inquiry to determine among other things whether there had been committed in the Eastern District of Tennessee violations of 18 U.S.C. 201 (*Bribery*), 18 U.S.C. 1503 (*Obstruction of Justice*), 18 U.S.C. 6121 (*Perjury*), and other Federal criminal statutes." (Emphasis supplied.)

Called before the grand jury, appellant, exercising her Fifth Amendment rights, refused to answer the ques-

tions asked her by the United States Attorney. Thereupon she was taken before a District Judge who was advised by the United States Attorney that the grand jury was investigating, among other things, possible violations of the *Federal Communications Act*. This was done, quite obviously, so that the government might ask the District Judge to grant immunity to appellant, thus to expose her to extensive cross-examination upon the subject matter of the grand jury's investigation. The Federal Communications statute is one of few which permits this type of procedure, namely, granting of immunity but reserving to the government the right to prosecute should the answers compelled under the grant of immunity be claimed to be perjurious. We can only speculate whether this procedural device was part of a government plan to obtain cross-examination of this young woman before formal accusation of her would foreclose such activity.

Responding in this cross-examination, appellant reiterated her charges against the involved jurors, verifying as true the contents of her affidavit. The cross-examination, however, was wide-ranging and indeed equipped the United States Attorney with valuable and important material for use in preparing for a perjury trial. If the accusations made by appellant in her affidavit were false, she had already committed perjury. It was not necessary to a prosecution for perjury to have her repeat such allegedly false charges before a grand jury. This is not to say that I would fault a government lawyer for employing whatever legitimate "strategy" he may choose as an aid to bringing criminals to justice. But in this case the disparity between what the government was allowed in preparing to prosecute and what was denied to defendant, in my view, impaired her right to a fair trial. The accused was cross-examined, 372 pages worth, before the grand jury and the

prosecution had a transcript of it from the time the examination was conducted.[1] Defendant, however, was not allowed *at any time* to have the grand jury testimony of her answers, whose grand jury and trial testimony brought about her conviction.

In preparation for trial, counsel made a motion for an order requiring the United States Attorney,

> "To furnish the defendant a transcript of the proceedings before the Grand Jury, including but not limited to, her testimony, *and testimony of William Link and John Curbow.*" (Emphasis supplied.)

The District Court in refusing to grant the motion said:

> "With respect to the defendant's motion for production of a transcript of the proceedings before the Grand Jury, *including the testimony of William Link and John Curbow,* the Court is of the opinion that the motion should be *denied,* except to the extent that the defendant is entitled to a copy of *her testimony* before the Grand Jury in accordance with Rule 16(a)(3), *Federal Rules of Civil Procedure.* A disclosure of testimony before the Grand Jury may properly be obtained only upon a showing of 'particularized need' and then in a manner consistent with the Jencks Act. *Dennis v. United States,* 384 U.S. 855; *United States v. Procter & Gamble,* 356 U.S. 617." (Emphasis supplied.)

Implicit in Judge Wilson's ruling is a conclusion that a "particularized need" for the grand jury testimony of Link and Curbow had not been shown and that in all events appellant could obtain and use such a transcript

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[1] Appellant did not take the stand at her trial. However, the entire transcript of her grand jury testimony in which she supported her charges against the jurors Link and Curbow was introduced as evidence in the government's case. If the evidence which she gave before the grand jury was true, as she claimed, she was not guilty.

only in conformity with the Jencks Act. In my view these conclusions are erroneous.

In today's scene, a lawyer with the duty of defending a person accused of crime has indeed a "particularized need" for previous relevant testimony of his client's accusers. The grand jury testimony of Link and Curbow brought about appellant's indictment and in the impending trial the prosecution's whole case would depend upon what they would say in open court. Any lawyer worth his salt would request a transcript of what these two had already sworn to. Appellant's counsel did so, but was turned down. Apart from the inherent obviousness of this need, I consider that in the case at bar defense counsel's motion, supported by an affidavit of his client, clearly stated such particularized need. The affidavit contained the following:

> "3. The defendant, Catherine Johnson, has been advised that the transcript of proceedings of the Grand Jury are not subject to subpoena or other process and can only be obtained by order of this Honorable Court. That the Grand Jury proceedings are in the exclusive control of the United States Attorney, as well as all other records, recordings, reports and documents and not available to defendant through any other source or through any other process except as here sought.
>
> "4. The defendant makes oath that each of the items mentioned in her motion for discovery and inspection *is material to the preparation of her defense* and that the request is reasonable in view of the court's recognition that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." (Emphasis supplied.)

The United States Supreme Court in *United States v. Procter & Gamble*, 356 U.S. 617 (1958), and *Pittsburgh*

Plate Glass Co. v. United States, 360 U.S. 395 (1959), has expressed circumstances under which a trial court may properly deny to litigants the use of transcripts of testimony given before a grand jury.

Whatever may earlier have been said as to whether an accused should be provided with the grand jury testimony of witnesses who are his accusers, the case of *Dennis v. United States*, 384 U.S. 855 (1966), expresses the Supreme Court's current view of the subject. I consider that it supports the view I take. In that case, conviction of the defendants was reversed because the trial court denied their motion to have furnished to them a transcript of the grand jury testimony of their accusers. The factual and procedural differences between that case and the one before us do not detract from its appositeness to the case at bar.[2] I read the Court's opinion as indicating that a "particularized need" for the grand jury testimony of the accusers of a defendant arises, without more, when defense counsel expresses his need for it to prepare for trial. Neither in the District Court nor here did the government make any claim that, aside from trial advantage to the prosecution, was there need to keep secret the requested grand jury testimony. My brothers do not point to any reason for withholding the testimony and neither did the District Judge in his opinion denying appellant's motion for new trial. Dealing generally with our subject on the point here involved, a unanimous Supreme Court in *Dennis*, said:

"In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, the Court acknowledged that 'after the

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[2] The motions that were there denied were made at the conclusion of the direct examination of each of the witnesses whose grand jury testimony was sought. I do not consider that a distinguishing circumstance.

grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.' In *Procter & Gamble, supra,* the Court stated that 'problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility * * *' are 'cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.' 356 U.S. at 683. And in *Pittsburgh Plate Glass, supra,* where four members of the Court concluded that even on the special facts of that case the witness' grand jury testimony should have been supplied to the defense, the entire Court was agreed that upon a showing of 'particularized need' defense counsel might have access to relevant portions of the grand jury testimony of a trial witness, 360 U.S., at 400, 405. In a variety of circumstances, the lower federal courts, too, have made grand jury testimony available to defendants." 384 U.S. at 870.

The Court's *Dennis* opinion may, in my view, also be read as expressing the thought that unless some other reasons intervene, it is the defense counsel who should make the determination as to his need for the grand jury testimony.

"In our adversary system, it is enough for judges to judge. *The determination of what may be useful to the defense can properly and effectively be made only by an advocate.*[3] The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clear cut dangers to individuals who are identified by the testi-

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[3] Cf. *Alderman v. United States,* 394 U.S. 165 (1969).

mony produced." (Emphasis supplied.) 384 U.S. at 875.

I conclude reference to *Dennis* by quoting these additional observations:

> "In our adversary system for determining guilt or innocence, *it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.* Exceptions to this are justifiable only by the clearest and most compelling considerations." 384 U.S. at 873. (Emphasis supplied.)

Relative to the assertion that it was within the discretion of the District Judge to rule as he did, the following is in point:

> "But the Government argues that it was not error for the trial judge to have denied petitioner's motions. With this latter proposition we disagree and we reverse." 384 U.S. at 869.

Other circuits have interpreted *Dennis v. United States, supra,* substantially as I have. See *United States v. Youngblood,* 379 F(2) 365 (2d Cir. 1967); *Cargill v. United States,* 381 F(2) 849 (10th Cir. 1967); and *Nat'l Dairy Products Corp. v. United States,* 384 F(2) 457 (8th Cir. 1967).

Further, I respectfully disagree that it was proper for the District Judge to rule that, had a particularized need been shown, the requested grand jury testimony could be used only "in a manner consistent with the Jencks Act." This Act, 18 U.S.C. § 3500, provides in subsection (a) thereof:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Govern-

ment shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

In *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 398 (1959), the Supreme Court made clear that the Jencks Act has no relevancy to an accused's request for grand jury minutes. The Court there said:

> "It appears to us clear that *Jencks v. United States, supra,* is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. Likewise it is equally clear that Congress intended to exclude these minutes from the operation of the so-called Jencks Act, 71 Stat. 595, 18 U.S.C. (Supp. V, 1958) § 3500."

To comply with the Jencks Act and wait until a government witness has completed his direct examination before obtaining that witness' grand jury testimony would aid little, if any, in the preparation for trial. I read *Dennis* as holding that under facts such as we have here the desired transcript should be made available at a time when it will assist in such preparation.

The majority observes that "no request for grand jury testimony was ever made at the trial for the purpose of cross-examination of government witnesses." The District Judge had already denied the request and, as set out above, the Jencks Act had no application. I fail to see the importance of the time of the request, unless it be that the government should be allowed to keep secret this important material until the eleventh hour, thus to gain advantage over the defense. No other reason is discernible.

Notwithstanding a contrary contention of the majority, I consider that I propose no new general rule. Neither does the ruling I suggest collide with any previous deci-

sion dealing with the special facts that are present here. I consider that my view comports with the statement of *Dennis* that:

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." 384 U.S. at 870.

I am of the opinion that the defendant's motion with her supporting affidavit disclosed a "particularized need" for the grand jury testimony of her accusers, Link and Curbow, and denial of her motion was error.

I would reverse and remand for a new trial.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered June 19, 1969.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX B.

OPINION OF THE DISTRICT COURT.

(Filed October 20, 1967.)

This is a criminal prosecution for perjury in violation of Section 1621 of Title 18, *United States Code*. The defendant was brought to trial upon a single count indictment and was convicted upon the verdict of a jury upon August 30, 1967. The case is before the Court upon the defendant's timely motions in arrest of judgment and for new trial.

The indictment, briefly summarized,[1] charges that the

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[1] The indictment reads in full as follows:

"IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

UNITED STATES OF AMERICA vs. CATHERINE JOHNSON	Violations: Perjury (18 USC 1621) Criminal No. 12,427

The Grand Jury charges:

COUNT I

1. On or about January 24, 1966, in the Eastern District of Tennessee, a competent tribunal, that is, a Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Eastern District of Tennessee, was conducting an inquiry to determine among other things whether there had been committed in the Eastern District of Tennessee violations of 18 USC 201 (Bribery), 18 USC 1503 (Obstruction of Justice), 18 USC 1621 (Perjury), and other Federal criminal statutes, said inquiry being in a case in which a law of the United States authorized an oath to be administered.

2. It was material to this Grand Jury Inquiry to ascertain, among other things, whether Catherine Johnson (also known as Patsy Jo Harris) had sexual intercourse with William Link and John Curbow, who were petit jurors in the trial of *United States v. James R. Hoffa, et al.* (Criminal No. 11,989), during said trial, and while said petit jurors were

(Continued on following page)

defendant did falsely testify before a certain grand jury of the United States that she had sexual intercourse with William Link and John Curbow, petit jurors in the case of *United States v. James R. Hoffa, et al.*, docketed in this court as Criminal No. 11,989, during the trial of that case and on the tenth floor of the Read House Hotel, Chattanooga, Tennessee, where such petit jurors were then sequestered. The indictment further charges that this testimony was material to the inquiry of that grand jury, duly impaneled and sworn in this court and inquiring to determine whether there had been committed in this district offenses of bribery (18 U.S.C. 201), obstruction of justice (18 U.S.C. 1503), perjury (18 U.S.C. 1621), and other violations of federal statutes. The indictment further charges that the defendant then and there did not be-

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(Continued from preceding page)

sequestered on the tenth floor of the Read House Hotel during the said trial.

3. On or about January 24, 1966, the defendant Catherine Johnson, having duly taken an oath before the said Grand Jury that, as a witness before said Grand Jury, she would testify truly, did, then and there, state material matters which she did not believe to be true, to wit, she stated that she had had sexual intercourse with the aforesaid William Link and John Curbow during the aforesaid trial on the tenth floor of the Read House Hotel.

4. The aforesaid testimony of Catherine Johnson, as she then and there well knew and believed, was not true in that Catherine Johnson did not have sexual intercourse with either the aforesaid William Link or the aforesaid John Curbow during the aforesaid trial on the tenth floor of the Read House Hotel.

In violation of Title 18, United States Code, Section 1621.

A TRUE BILL:
Geo. R. Parker
Foreman

J. H. Reddy
United States Attorney
Michael T. Epstein
Special Attorney
U. S. Department of Justice."

lieve her testimony before the grand jury to be true and that the testimony was, in fact not true.

The motion in arrest of judgment rests upon two grounds: (1) that the indictment does not charge an offense and (2) that the Court was without jurisdiction of the offense charged in the indictment. The motion for a new trial rests upon 25 grounds. For the sake of discussing the motions and their grounds, the Court has grouped them into the following general categories:

(1) Jurisdiction of the Court (Ground 2 of motion in arrest of judgment),

(2) Sufficiency of the indictment (Ground 1 of motion in arrest of judgment and Ground 5 of motion for new trial),

(3) Circumstances surrounding the giving of the alleged perjurious testimony (Grounds 6 and 7 of motion for new trial),

(4) Pre-trial discovery (Ground 8 of motion for new trial),

(5) Admissibility of evidence (Grounds 9 through 16 of motion for new trial),

(6) Sufficiency of evidence (Grounds 1 through 4 of motion for new trial),

(7) Instructions of the Court (Grounds 18 and 19 of motion for new trial), and

(8) Deliberations of the jury (Grounds 17 and 20 through 24 of motion for new trial.

I. *Jurisdiction of the Court*

It is urged, in defendant's motion in arrest of judgment, that the Court "was without jurisdiction of the offense charged in the indictment," but no mention is made of this ground in the brief filed on behalf of defendant.

Defendant was charged with an offense against a law of the United States (18 U.S.C. 1621), and the Court's jurisdiction of the alleged offense would be founded in the provisions of 18 U.S.C. 3231. The Court is unaware of any fact or circumstance which would have affected its jurisdiction of the offense charged. To the extent that this ground is based upon the alleged failure of the indictment to state an offense, it will be considered further below.

II. *Sufficiency of the Indictment*

Defendant attacks the indictment on the following grounds: (1) that the indictment fails to allege that defendant "wilfully" gave false testimony before the grand jury and (2) that the indictment fails to allege that the defendant's testimony was material to a grand jury investigation of possible violations of the Federal Communications Act (Chapter 5 of Title 47, *United States Code*), whereas defendant's testimony was compelled before the grand jury on the basis that it was material to such violations.

Taking up first the defendant's contentions relating to the failure of the indictment to charge that defendant "wilfully" gave false testimony, the Court is of the opinion that this ground is without merit. It is true that the indictment does not contain the word "wilfully." It is the contention of the defendant that the very word "wilfully" must be alleged, or, in the alternative, that the indictment does not contain words of similar import. It is the position of the government that the indictment sufficiently charges the element of wilfulness, although admittedly the word itself is not used.

There are some older federal cases holding that an indictment for perjury is fatally defective if it fails to allege the element of "wilfullness." See *United States v. Eddy,*

(C.C. Ala., 1890), 43 F. 67; *United States v. Eddy,* (C.C. Mont., 1905) 134 F. 114; and *United States v. Lake,* (D.C. Ark., 1904) 129 F. 499. The opinions in *Edwards* and *Lake* do not show whether the indictments therein merely failed to contain the word "wilfully" or whether they were wholly void of allegations relating to intent.[2] The Court takes the *Eddy* opinion to require, even under the technical rules of pleading then in force, only "the use of the word 'wilfully' or plainly equivalent words in false swearing." 134 F. 118.

At any rate, common law rules of criminal pleading have been rendered obsolete in federal courts. 4 *Barron & Holtzoff, Federal Practice & Procedure* 59, Section 1913; *Norris v. United States,* (C.A. 5, 1946) 152 F.2d 808, cert. den. 328 U.S. 850, 90 L.Ed. 1623, 66 S.Ct. 1118. Rule 7(c) of the *Federal Rules of Criminal Procedure,* provides that:

> "The indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. . ."

The Supreme Court has said that "(t)he Federal Rules of Criminal Procedure were designed to eliminate technicali-

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[2] The only case found by the Court which expressly holds an indictment not containing the very word "willful" is fatally defective in *Pullen v. United States,* (C.A. 5, 1947) 164 F.2d 756, a case involving alleged violation of what was then 18 U.S.C. 52 (now 18 U.S.C. 242), which made it unlawful to wilfully subject a person to the deprivation of a right, privilege or immunity secured by the Federal Constitution or laws. Two of the six judges sitting dissented on the basis that the defect did not require reversal. Even the majority stated its holding in these terms:

> "We conclude that to try a defendant on an indictment that fails to charge him with acting willfully, in which trial the charge of the Court to the jury failed to point out the distinction between bad purpose in chastising a prisoner and willful intent in depriving such prisoner of a constitutional right, is a matter of substance, the omission of which was prejudicial to the defendants. . . ."

ties in criminal pleading and are to be construed to secure simplicity in procedure." *United States v. Debrow,* (1953) 346 U.S. 374, 98 L.Ed. 92, 74 S.Ct. 113.[3] That case likewise involved a prosecution for perjury under 18 U.S.C. 1621.

There can be no doubt that "wilfulness" is an element of the crime of perjury denounced in Section 1621. *Letchos v. United States,* (C.A. 7, 1963) 318 F.2d 481. Likewise, it is clear that the element of wilfulness, where a statutory part of the crime, must be fairly alleged in the indictment. See *Grant v. United States,* (C.A. 9, 1961) 291 F.2d 746. The Court thinks that the proper rule was well stated in the case of *Finn v. United States,* (C.A. 4, 1958) 256 F.2d 304, 306:

> "Where willfulness or knowledge is made an element of the crime, the statutory requirement is not to be ignored. The charge must either include these terms, *or words of similar import.* (Citations omitted) The defendant insists that the very words 'knowingly and willfully' must be used and attaches no weight to the propriety, recognized in the cited cases, of using alternative language. The draughtsman of the information in this case failed to observe the better and easier practice, generally followed by careful prosecutors, of charging the offense in the language of the statute and regulation. This would have avoided all question. In our judgment the information nevertheless sufficiently alleges the essentials. . ." (Emphasis present)

The Court is of the opinion that the indictment in the instant case fairly charges the element of "wilfulness," as that word is used in Section 1621. See *United States v. Murdock,* (1933) 290 U.S. 389, 394, 78 L.Ed. 381, 385, 79 S.Ct. 203, 207; *Morissette v. United States* (1952), 342

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[3] *Debrow* likewise was a prosecution for perjury under Section 1621. However, there the simple issue was whether the indictment was insufficient for failing to state the name of the person administering the oath.

U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240. With respect to perjury, it would appear that the statute requires no more than that the accused know of the oath and falsity of the testimony, and knowingly and voluntarily answer falsely rather than truthfully. One who, under oath, states an assertion of fact, "which she did not believe to be true," could hardly be said to have done so other than "wilfully." The Court is of the opinion that defendant's contention in this respect is without merit.

Turning to the defendant's second contention with respect to the indictment, the Court understands defendant to argue that the indictment is insufficient in that it fails to allege that defendant's testimony before the grand jury was material to a grand jury investigation of possible violations of the Federal Communications Act (Title 47, Chapter 5, *United States Code*), whereas defendant's testimony was compelled before the grand jury under the immunity provided by 47 U.S.C. 409(1), which immunity could only arise in a proceeding based upon or growing out of a violation or violations of Chapter 5.

It is clear that allegations as to materiality in an indictment for perjury may be in simple and general terms, and it is not necessary to allege the facts and circumstances which made the false testimony material to the proceedings. *Markham v. United States* (1895), 160 U.S. 319, 40 L.Ed. 441, 16 S.Ct. 288; *Paternostro v. United States* (C.A. 5, 1962), 311 F.2d 298; *Bilderback v. United States* (C.A. 5, 1957), 249 F.2d 271, cert. den. 356 U.S. 946, 2 L.Ed.2d 820, 78 S.Ct. 793, reh. den. 357 U.S. 915, 2 L.Ed.2d 1163, 78 S.Ct. 1153, and other cases cited at note 173, 18 U.S.C.A. 1621. The indictment in this case plainly charges that defendant's testimony was material to a grand jury investigation into possible violations of certain statutes. Testimony may be material to more than one

federal statute, and that the defendant's testimony may have been material to possible violations of Chapter 5, Title 47, would not of necessity mean that such testimony was not material to other federal statutes, such as those alleged in the indictment. The Court is of the opinion that this ground is without merit.

III. *Proceedings Before the Grand Jury*

In Grounds 6 and 7 in support of her motion for new trial, defendant contends that she was unlawfully and unconstitutionally compelled to testify before the grand jury and that the Court should therefore have dismissed the indictment or directed a verdict of acquittal. It would appear to the Court that the issue here sought to be raised was waived by failure of the defendant to timely raise the issue. Under Rule 12 (b) (2) and (3), *Federal Rules of Criminal Procedure*, if the defendant desired to raise an issue with respect to the indictment, this should have been done before the plea was entered. The indictment was returned in this case upon March 24, 1967. The defendant's plea was entered upon April 10, 1967. It was not until August 8, 1967, at the commencement of the trial, that the motion to strike the indictment was first made. There was no showing of any valid reason why the motion had not previously been made or why the Court should allow the motion to strike at that late date.

However, the Court will nevertheless proceed to consider the defendant's motion to strike the indictment upon its merits. The heart of the defendant's argument is the contention that the grand jury was not in the course of an inquiry which was within the scope of the immunity grant of 47 U.S.C. 409(1). The Court finds it unnecessary to reach the question whether the grand jury inquiry and the defendant's testimony related to possible violations of the

Communications Act, because, on reason and authority, the Court is of the opinion that unlawful or unconstitutional compulsion of testimony would not provide a defense to a perjury charge.

In the case of *United States v. Winter* (C.A. 2, 1965), 348 F.2d 204, the defendant was indicted and convicted of perjury while testifying before a federal grand jury. He contended that his testimony before the grand jury had been obtained in violation of his constitutional rights to counsel and against self-incrimination. The Court there reviewed the authorities at some length, and held:

> ". . . even if appellant were entitled, as a matter of constitutional right, to be advised that he could consult with counsel prior to testifying before the grand jury, omission so to advise him is no defense to a charge that he thereafter perjured himself in the grand jury room."

Likewise, in *United States v. Orta* (C.A. 5, 1958), 253 F.2d 244, cert. den. 357 U.S. 905, 78 S.Ct. 1149, it was held that a witness before a grand jury whose testimony was compelled in violation of his constitutional right could successfully be prosecuted for perjury in the course of such testimony. The Seventh Circuit, in *United States v. Parker* (C.A. 7, 1957), 244 F.2d 943, reached the same conclusion. See also *United States v. Remington* (C.A. 2, 1954), 208 F.2d 567, wherein defendant's conviction for perjury during the course of a trial upon an indictment subsequently invalidated was upheld.

The Court finds the principles of these cases to be applicable in the instant case. Assuming, arguendo, that no immunity attached to the defendant's testimony by virtue of 47 U.S.C. 407(1), then her testimony before the grand jury would have been obtained in violation of her constitutional rights. But, as the Supreme Court said in

Glickstein v. United States (1911), 222 U.S. 139, 56 L.Ed. 128, 32 S.Ct. 71:

> ". . . the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury."

IV. *Pre-Trial Discovery*

Defendant contends that the Court erred in refusing to compel the government to produce, in advance of trial, the grand jury testimony of William Link, John Curbow and Vernon Bonner. These three individuals were members of the petit jury in the case of the *United States v. Hoffa, et al.*

On April 20, 1967, the defendant moved for the production of various documents and writings, including "a transcript of the proceedings before the Grand Jury, including . . . testimony of William Link and John Curbow." The Court, by its order of May 12, 1967, granted defendant part of the discovery she sought, but denied, upon the record at that time, to order wholesale production of grand jury testimony:

> "With respect to the defendant's motion for production of a transcript of the proceedings before the Grand Jury, including the testimony of William Link and John Curbow, the Court is of the opinion that the motion should be denied, except to the extent that the defendant is entitled to a copy of her testimony before the Grand Jury . . . A disclosure of testimony before the Grand Jury may properly be obtained only upon a showing of 'particularized need' and then in a manner consistent with the Jencks Act. *Dennis v. United States,* 384 U.S. 855; *United States v. Procter & Gamble,* 356 U.S. 617."

Link and Curbow testified at the trial, but no attempt was made at that time, the proper time as the Court indicated

in its opinion, to obtain the grand jury testimony of either. In fact, no mention was made of the grand jury transcript at any time during the trial itself. Vernon Bonner did not testify at the trial, and the only basis upon which the defendant would have been entitled to his grand jury testimony would have been under the rule of *Brady v. Maryland,* (1963) 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194. As a part of the same pre-trial motion referred to above, the defendant requested "(a)ll documents, records, statements or information favorable to defendant or material to her defense." The Court in its order of May 15, 1967, stated the following:

> "The Government has indicated its awareness of its obligations under the *Brady* decision and stated that it will fulfill its obligation in this respect. If at the time of the trial the defendant is not satisfied that the Government has complied with the *Brady* decision, the defendant may at any appropriate stage in the trial renew her motion for production of evidence in possession of the Government favorable to her."

Defendant did not subsequently raise any question as to *Brady* type evidence.

The Court is of the opinion that its ruling as to the grand jury transcript was correct. There was never a showing of a "particularized need" for such transcript. *United States v. Procter & Gamble Co.* (1958), 356 U.S. 677, 2 L.Ed.2d 1077, 718 S.Ct. 983; *Pittsburgh Plate Glass Co. v. United States* (1959), 360 U.S. 395, 3 L.Ed.2d 1323, 79 S.Ct. 1237; *Dennis v. United States* (1966), 384 U.S. 855, 16 L.Ed2d 973, 86 S.Ct. 1840. Further, no request was made for such material after Link and Curbow testified at the trial, and Bonner never testified. Cf. *United States v. Youngblood* (C.A. 2, 1967), 379 F.2d 365, 369, 370.

The Court is of the opinion that this ground is without merit.

V. *Admissibility of Evidence*

Defendant contends that the Court erred in admitting at the trial (1) the testimony of Frederick W. Buol as to statements made by defendant and in refusing to admit (2) the testimony of Troyce Dean Henry as to the identity of individuals present on the tenth floor of the Read House on the night following the rendition of the verdict and discharge of the jury in the case of *United States v. Hoffa, et al.*, (3) an accident report which purportedly indicates that one "R. L. Carpenter" was involved in an automobile accident at a time when Deputy Marshal R. L. Carpenter was recorded upon the marshal's log as having been on duty on the tenth floor of the Read House during the trial, (4) the testimony of Deputy Marshal Richard Reidy, and (5) the testimony of Bob Odom.

Taking up first the testimony of Frederick W. Buol, the Court is of the opinion that it was correct in admitting his testimony as to statements made by the defendant. Buol is an F.B.I. agent stationed in Jacksonville, Florida, formerly stationed in Miami, Florida. He stated that in April, 1966, he interviewed the defendant at the residence of a friend of hers in Daytona Beach, Florida. He went there in the presence of two other agents, advised the defendant that he would like to talk with her, and asked if they could talk in private. Defendant, Buol and one of the other two agents stepped out into the front yard of the house. Buol testified that he told the defendant she did not have to talk to them, that anything she did say could be used against her in a court of law and that she could immediately contact an attorney if she chose. Buol further testified that he did not advise defendant that if she did not have an attorney, she would be furnished the services of an attorney. At that time no indictment had been returned, and agent Buol testified that he did not arrest

defendant nor in any way take her into custody. The substance of his report of defendant's conversation was that defendant had expected to be contacted by law enforcement officers with regard to her testimony before the grand jury, that the affidavit (substantially the same as her subsequent testimony before the grand jury) would have to stand, that she would not have testified as she did before the grand jury if it were not true, that she was sorry she had ever gotten "tied up in this thing," and that she had "made (her) bed and (was) going to lie in it." Buol testified that he asked her if her last statement indicated there was any error in the affidavit which she might like to discuss and that she failed to respond to this question. He further stated that defendant said she knew "about perjury, five years and $2,000."

Defendant objected in timely fashion to the testimony of agent Buol, on the basis that he had failed to advise her of her right to appointed counsel, defendant relying on *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602. The Court is of the opinion that the rules set forth in *Miranda* are not applicable to the instant situation. The guidelines formulated in that case concerned "custodial interrogations" and the majority opinion throughout predicates itself upon interrogations of a person "in custody." The question of what constitutes a "custodial interrogation" received somewhat short shrift in the majority, but the Court did indicate what kind of interrogations it was concerned with:

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

In *Stern v. Robinson* (W.D. Tenn., 1966), 262 F. Supp. 13, Judge Bailey Brown pointed out that the *Miranda* rules

"are limited to substantially 'in custody' interrogation" and declined to apply *Miranda*. In *United States v. Schlinsky* (D.C., Mass., 1966), 261 F. Supp. 265, the defendant moved to suppress the testimony of certain Internal Revenue Agents as to conversations with the defendant at defendant's drug store, which conversations were at the instance of the agents. One or more agents had gone to defendant's store on several occasions and interviewed him as to his books and records, all without any warning of any rights. Judge Caffrey held that:

> ". . . the defendant was at no time when interviewed at his own store in custody or otherwise deprived of his freedom in any significant way. The record establishes that he was never interviewed by the agents except in the friendliest surroundings of his own store, and I rule that he acted voluntarily in all of his dealings with the agents, free from any of the compulsive factors adverted to in the *Miranda* opinion. The teaching of both *Miranda* and *Escobedo* is inapplicable to this fact situation."

Another case involving Internal Revenue Agent interviews was *United States v. Fiore* (W.D. Pa., 1966), 258 F. Supp. 435, wherein the Court said:

> ". . . there is the clear intendment of the Court in *Miranda* that the requirements of a warning of constitutional rights . . . are to be confined to situations of 'custodial interrogation'. The reiteration of this term throughout the opinion and the prefacing of the decision with a lengthy recital of police abuses leaves no doubt as to what situations the Court had in mind in reaching its decision.
>
> "We find nothing in *Miranda* to suggest that these same safeguards are to be construed as mandatory in the type of investigative questioning to which the defendant here was subjected. Though hardly to be characterized as pleasant, neither of these meetings

> resembled a 'custodial interrogation'. Agent Skoufis questioned the defendant in defendant's own apartment. Special agent McMahon questioned him at the office of his accountant . . ."

See also *United States v. Davis* (D.C. Mass., 1966), 259 F. Supp. 496, in accord with the foregoing cases.

In the present case the interview was conducted at the home of a friend of the defendant, some of defendant's friends or acquaintances were present in the home a few feet away from where the interview took place, the defendant was not placed under arrest and the defendant was advised that she did not have to consent to such interview and that she could contact her attorney at any time. Mr. Buol's account of the interview, the only account in the record, would indicate that it was in no way coercive by virtue of the form of the questions put or statements made by the agents.[4] Under the circumstances herein presented, the Court is of the opinion that this was not a "custodial interrogation," which would give rise to the operation of the rules set forth by the Supreme Court in *Miranda v. Arizona, supra.* The Court is accordingly of the opinion that it was correct in admitting testimony of agent Buol and that the defendant's ground in this respect is without merit.

Defendant further contends that the Court erred in rejecting testimony of the witness Troyce Dean Henry as to the identity of persons present on the tenth floor of the Read House on the night following the rendition of the verdict in the *Hoffa* case and the discharge of the jury.

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[4] The only right of which the defendant was not advised was her right to appoint counsel. The defendant has been represented by retained counsel at every stage of these proceedings from the day she testified before the grand jury through the present time. On most occasions she had more than one counsel. There was no indication that she was indigent at the time of the interview and thus unable to avail herself of the services of retained counsel.

The witness was asked if any female was present at the time and place indicated and an objection was interposed. The Court sustained the objection on the ground that the same would be irrelevant. The witness later testified that to her knowledge no juror was present at that time. She also later testified (Tr. 366) that she did not see the defendant there at that time, but that she did see a person named Bobbie Ann Sells. Defendant is here charged with having falsely testified that she engaged in sexual intercourse with two jurors in the *Hoffa* case during that trial. The Court sees no relevance in the fact that another prostitute, or even other women, may have been present on the tenth floor of the Read House after the trial was over. The Court believes such evidence too remote to any issue in this case to have any probative value.

Defendant further contends that the Court erred in rejecting a city police accident report which related to an accident which occurred during the *Hoffa* trial. The defendant contends that the report would show that an accident occurred involving one "R. L. Carpenter" at a time when the marshal's log indicated that Deputy Marshal R. L. Carpenter was on duty on the tenth floor of the Read House. The officer who produced the report testified that he had investigated the accident and that according to his report a person by the name of R. L. Carpenter was a passenger in an automobile driven by one William C. Whitworth. The officer testified that he did not know who Mr. Carpenter was. In the first place, this report is based upon hearsay evidence, that is, the statement of some person as to his identity, and is accordingly incompetent. Further, however, even if it were competent to show that a deputy marshal was at a place other than where he was supposed to be, it would have no relation to the issues in this case. It is a collateral and immaterial matter.

Defendant further contends that the Court erred in rejecting its offer of the testimony of former U. S. Deputy Marshal Richard Reidy. In a conference in chambers (Tr. p. 352, et seq.), counsel for the defendant represented that, if called, Marshal Reidy would testify that while assigned to Chattanooga during the *Hoffa* trial, he frequently went to a Veterans of Foreign Wars Club and came to know Troyce Dean Henry, whom he frequently dated and drank with during the trial, and that on the night following the rendition of the verdict in the *Hoffa* case and after the jury had been discharged, Reidy took Mrs. Henry to the tenth floor of the Read House. The Court is of the opinion that this testimony would be completely irrelevant to any issue in the trial of this case. This would have nothing to do with the defendant, who was not present at any of these times, so far as the record shows, nor to her alleged acts of misconduct with jurors Link or Curbow to which neither Reidy nor Mrs. Henry claimed to be witnesses. The Court is of the opinion that it correctly rejected this offer of proof and that defendant's ground in this respect is accordingly without merit.

Defendant further contends that the Court erred in rejecting the offered testimony of Bob Odom. Mr. Odom is a native of Blue Ridge, Georgia, a community located not far from the residence of juror John Curbow. The defendant offered to prove by the testimony of Mr. Odom that juror Curbow had at some time been dating Odom's wife. The testimony was offered upon the issue of Mr. Curbow's credibility. However, the Court is of the opinion that such evidence would not be proper upon that point. It is the general rule that credibility of a witness cannot be attacked by the showing of specific acts of misconduct. 58 *Am. Jur.*, "Witnesses," Sec. 758; *United States v. Hoffa*, 349 F.2d 20 (6th Cir.), affd. 385 U.S. 293 (1966); *United*

States v. Haynes, 81 F.Supp. 63, affd. 173 F.2d 223 (3rd Cir., 1949). Of course, credibility may be attacked by general evidence of a witness's reputation for character. Further, whether juror Curbow was or was not dating another man's wife at any time would have no relevance to the issue whether Mr. Curbow engaged in misconduct during the trial of the *Hoffa* case. The Court is of the opinion that it correctly rejected this testimony and accordingly that this ground of defendant's motion is without merit.

VI. *Sufficiency of the Evidence*

Defendant further contends that the Court erred in not directing a verdict of acquittal at the close of the government's proof and again at the close of all the proof. Defendant's main argument in this respect is that the government's proof did not satisfy the "two-witness" rule.

The "two-witness" rule, peculiar to perjury prosecutions, requires direct proof of the falsity of statements made by the testimony of two witnesses or by the testimony of one witness plus corroborating circumstances. *La Placa v. United States,* (C.A. 1, 1965) 354 F.2d 56, cert. den. 383 U.S. 927, 86 S.Ct. 932, 15 L.Ed.2d 846. The reason behind this rule is that evidence in a perjury trial must consist of something more convincing that one person's word against another's. *United States v. Beach,* (C.A 4, 1961) 296 F.2d 153; *Weiler v. United States,* (1944) 323 U.S. 606, 89 L.Ed. 495, 65 S.Ct. 548.

Defendant argues that neither juror Link nor juror Curbow was able to testify that the other did not engage in misconduct with the defendant, and that the "two-witness" portion of the rule above-stated could therefore not be satisfied. This very argument was passed upon by our Court of Appeals in the case of *May v. United States,*

(C.A. 6, 1960) 280 F.2d 555. May was charged with having falsely testified that he had visited nine different women as part of his organizational effort on behalf of his union. Each of eight of the nine testified that May did not visit her, but none was able to testify that he did not visit any of the others. The Court quoted approvingly the following statement of *Wigmore* (3rd Ed., Vol. VII, Sec. 2042, p. 280):

> "Moreover, the corroboration is required for the perjured fact as a whole, and not to every detail or constituent part of it."

The Court painstakingly reviewed the authorities and concluded that the defendant's argument should be rejected. The Court is of the opinion that the same reasoning applies to the argument of this defendant. See also *United States v. Seavey,* (C.A. 3, 1950) 180 F.2d 837, and *United States v. Palese,* (C.A. 3, 1943) 133 F.2d 600.

It should be further pointed out that, in any event, the testimony of each of the jurors Link and Curbow was strongly corroborated by the testimony of the deputy marshals charged with their custody during the *Hoffa* trial. According to this testimony, no prostitute was ever on the tenth floor of the Read House during that trial. The credibility of these witnesses, as all the witnesses, was a matter for the jury.

The Court is of the opinion that the "two-witness' rule was clearly satisfied in this case and that defendant's contention in this respect is without merit. Further, the Court is of the opinion that the evidence is sufficient to support the verdict, and that defendant's general contention to the contrary is without merit.

VII. *Instructions of the Court*

Defendant contends that the Court erred in two respects in charging the jury: (1) with respect to the permissible inference of intent with respect to the natural consequences of acts knowingly done, and (2) with respect to the duty of jurors to deliberate.

One portion of the charge excepted to was as follows:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts that are knowingly done or knowingly omitted. So unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the defendant intended all of the natural, probable consequences which one standing in like circumstances and possessing like knowledge could reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

The defendant contends that this is the same charge condemned in *United States v. Denton,* (C.A. 6, 1964) 336 F.2d 785, and *Mann v. United States,* (C.A 5, 1963) 319 F.2d 404. In *Mann,* the charge given was held to be plain error and the case was reversed. That was an income tax evasion case and the Court thinks that the difference between that offense and the offense of perjury should be taken into consideration. It should further be noted that the sole issue actually litigated in the present case was whether the testimony given by defendant was false. At any rate, the Court's instruction is not the instruction given by the Court in *Mann.*

In *Denton,* the Sixth Circuit criticized an instruction given by the trial court as ". . . clumsy and, if taken alone, confusing." The Court pointed out that the same instruc-

tion had been held not to be reversible error by the Ninth Circuit in *Sherwin v. United States,* (C.A. 9, 1963) 320 F.2d 137, cert. den. 375 U.S. 964, 11 L.Ed.2d 420, 84 S.Ct. 481, reh. den. 376 U.S. 946, 11 L.Ed.2d 771, 84 S.Ct. 796. The instruction given by the Court in this case differs from the *Denton* instruction in that the Court is of the opinion that its instruction is clearer on the point characterized by *Denton* as possibly misleading. The Court is likewise of the opinion that its instruction, in the context of all of its instructions on intent, like those in *Denton* and *Sherwin,* was not prejudicial to defendant. The Court is of the opinion that this ground advanced by defendant is without merit.

Defendant also contends that the Court erred in its instructions on the duty of the jury to deliberate, characterizing the Court's charge as a "dynamite" charge of the kind condemned in *Greene v. United States,* (1962) 309 F.2d 852. The trial court in *Greene* told the jury that:

> ". . . it is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment because the rule is that the majority will have better judgment than the mere minority. . ."

The Court's charge in the present case in no way approached such a statement. The Court charged as follows on this topic:

> "The verdict must, of course, represent the considered judgment of each of the 12 jurors. In order to return a verdict it is necessary that each juror agree thereto, that is, the verdict must be unanimous. Now, it is, therefore, your duty as jurors to consult with one another in good faith and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgments.
>
> "Each of you, of course, must ultimately decide the case for yourself but you should do so only after a

very searching consideration of all the evidence and a very careful and respectful consideration of the views of your fellow jurors.

"In the course of your deliberations you should not hesitate to re-examine your own views or change your own opinion if you should be persuaded by reason and discussion of the fellow jurors of the correctness of their views.

"However, you should not surrender an honest conviction as to the weight or effect of the evidence or the verdict to be returned merely for the purpose of returning a unanimous verdict."

This instruction was given during the main charge of the Court, and prior to the time the jury retired to begin deliberations. The Court is of the opinion that the charge is proper and that it committed no error in this respect.

VIII. *Deliberations of the Jury*

The defendant further contends that the Court erred in (1) declining to send the jury an exhibit pursuant to their request, and (2) refusing to grant a mistrial on the ground that the jury had been communicated with in an unauthorized manner.

With respect to the first of these contentions, it is true that the manner in which one of the exhibits was introduced and the way counsel treated the exhibit created some difficulty when the jury requested the exhibit. The exhibit in question was the transcript of proceedings before the grand jury on January 24 and 25, 1966. That transcript is 372 pages long. The first 41 pages are a report of that part of the proceedings wherein the defendant declined to answer any question, except for name and present address, on the basis of the self-incriminatory privilege. Pages 42 through 130 are a record of that part of the proceedings before Judge Robert L. Taylor wherein

Judge Taylor held that defendant would receive immunity, by virtue of 47 U.S.C. 407(1) from prosecution arising out of her testimony, except for perjury. The remaining 242 pages are the testimony of the defendant, which ranges across a broad vista of persons, places and events.

A proper foundation was stipulated by the parties and the entire transcript as above described was received without objection into evidence as Government's Exhibit 2 (Tr., p. 130). Immediately, Mr. Mittler, one of the counsel for the government, read from various pages of the grand jury transcript. (see Trial Transcript, pp. 131-137) No objection was heard to any of these proceedings. No further portion of the grand jury transcript was read into the record at any other point during the presentation of proof. However, during his argument, Mr. McClellan, one of defendant's counsel, read a brief portion of the grand jury transcript which had not been read into the record during the taking of the proof. (Trial Transcript, pp. 562-563) Then, during the government's closing argument, Mr. Epstein read yet another brief portion of the transcript which had not been read by either Mr. Mittler or Mr. McClellan. (Trial Transcript, pp. 584, 586-589) No objection was made by any party to any of these proceedings.

The jury retired and some time thereafter orally requested that Government's Exhibit 2, the grand jury transcript, be sent to them. Court was opened and, in the absence of the jury, representations were made by counsel. The government objected to the submission of that portion of the grand jury transcript which related to the grant of immunity. Defendant's position was that the entire transcript should go to the jury. After a recess, the jury returned to the courtroom and formally made its request for "a copy of the testimony of the defendant given to the grand jury" and the marshal's log showing which marshals

were on duty with the *Hoffa* jury. (Trial Transcript, p. 623) The Court advised the jury that it would take the request under advisement and cautioned the jury to consider all the evidence in the case. The jury retired once more. The Court then ruled that the log would be made available, and, after considerable debate by counsel, the Court, in the exercise of its discretion, denied the request for the grand jury transcript in toto. Subsequently, a written request was received from the jury for "the Catherine Johnson deposition." (Trial Transcript, p. 635) The Court stated that it would, without objection, send to the jury that portion of the grand jury transcript which had been read into evidence. Defendant objected to any portion of the transcript being made available without those portions read by the defense counsel during argument also being made available. The Court ordered the reporter to prepare all portions of the grand jury transcript which had been read during the trial. After this had been done, the Court offered, by agreement of counsel, to make available to the jury all portions of the exhibit read during the trial, including those portions read during argument. The government objected. After the request of the jury was clarified, the Court ruled that, under the circumstances, no part of the grand jury transcript would be made available.

Of course, the matter of sending or refusing to send documentary evidence to the jury room is a matter within the sound discretion of the trial court. 53 *Am. Jur.* 661, "Trial" 924; *Murray v. United States,* (C.A. D.C., 1942) 130 F.2d 442, 76 U.S. App. D.C. 179. The exhibit in this case contained a great deal of extraneous material. It was quite lengthy, and might have distracted the jury from the issues in this case. Only a very small portion was read to the jury during the presentation of proof, and only a

very small additional portion during the respective arguments of counsel. When the Court suggested sending only that portion of the record read to the jury, counsel objected. Under all the circumstances, the Court is of the opinion that it did not abuse its discretion in refusing to send the exhibit to the jury.

The final matter raised by the defendant is the alleged improper communication with the jury during its deliberations. This matter is fully covered in the record (Trial Transcript, pp. 615, 621-622):

> "Mr. Krislov: As I understand it, a request was made by the jury to someone, that was not a request in writing, and apparently someone communicated with the jury, as I understand it.
>
> "The Court: Yes, Mr. Sertel advised the Court—Mr. Sertel, what were the facts and circumstances in that respect?
>
> "Mr. Sertel: Your Honor, there was a knock on the grand jury door, I answered the knock and Mr. Carl Brooking came forward to the door and made that request.
>
> "The Court: Made what request?
>
> "Mr. Sertel: That they would like to have a portion of the grand jury testimony of Catherine Johnson."

Mr. Sertel is a Deputy United States Marshal who was in charge of the jury. Mr. Brooking was the foreman of the jury in this case. After the above, no further representations were made to the Court and no question was raised with regard to this matter. The only request in this regard was by Mr. Krislov, one of defendant's counsel, that the marshals be instructed that all communications with the jury be in writing signed by the party making the communication. This request took place prior to the colloquy above, and the jury was so instructed.

The cases cited by the defendant in regard to her contention in this respect are quite different from this case. In *Wheaton v. United States,* (C.A. 8, 1943) 133 F.2d 522, affidavits of five jurors indicated that a court officer had come into the jury room and spent about twenty to thirty minutes or longer explaining to the jury how to deliberate and vote on the respective counts of the indictment, at the instance of the trial judge. The Court made the following observation:

> "The law is that communications, relative to a case on trial, between jurors and third persons, or witnesses, or the officer in charge of the jury, are absolutely forbidden, and, if it appears that such communications have taken place, a presumption arises that they were prejudicial, but this presumption may be rebutted by evidence showing the communications to have been harmless. . . ."

In *Fina v. United States,* (C.A. 10, 1931) 46 F.2d 643, the trial court gave supplementary instructions to the jury in the absence of defendant and defendant's counsel and no record was made of what was said. It was held that this was presumptively prejudicial and the conviction was reversed.

In the present case, inquiry was promptly made of the officer as to what had transpired, and it was immediately apparent that the communication was harmless. No further question was raised. The Court is of the opinion that a mere request by a jury foreman for a court officer to relay a request for the submission of documentary evidence to the trial judge, even though orally made, is no ground for a new trial. The Court is of the opinion that this ground is without merit.

IX. *Conclusion*

The Court having examined each of the grounds advanced by defendant in support of her motions, respectively, for new trial and in arrest of judgment and the briefs of counsel with respect thereto, and having the opinion that no ground has been advanced which would entitle defendant to a new trial or to arrest of judgment, the Court is of the opinion that the motions should be denied.

An order will enter accordingly.

APPENDIX C.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U. S. Constitution Amendment V:

No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

18 U.S.C. § 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

47 U.S.C. § 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules ~~have~~ been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

47 U.S.C. § 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both.

47 U.S.C. § 409(l)

(*l*) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 732

CATHERINE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 38-64) is unreported. The opinion of the court of appeals (Pet. App. 16-37) is reported at 414 F.2d 22.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1969. A petition for rehearing was denied on September 16, 1969. The petition for a writ of certiorari was filed on October 13, 1969. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for perjury before a grand jury, it was prejudicial error to refuse to allow petitioner, who had been given a copy of her own testimony, pre-trial inspection of the grand jury testimony of prosecution witnesses as well.

2. Whether, in a prosecution based on specific allegations of perjury, the trial court properly exercised its discretion in refusing to provide the entire transcript of petitioner's grand jury testimony to the jury for use during its deliberations.

3. Whether pre-indictment statements made by petitioner, who was not in custody and who was warned of her rights to silence and to the assistance of counsel, were properly admitted into evidence at her perjury trial.

4. Whether petitioner, who had been granted immunity under the Federal Communications Act with respect to her grand jury testimony, was entitled to raise as a defense to a charge of perjury the contention that her false statements were not material to a possible violation of that statute.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of perjury in violation of 18 U.S.C. 1621. On September 28, 1967, she was sen-

tenced to imprisonment for a period of three years. The court of appeals affirmed.

On January 24, 1966, petitioner testified before a grand jury that, after a deputy marshal took her to the tenth floor of a hotel where the jurors had been sequestered during the Chattanooga trial of James R. Hoffa, she had sexual intercourse with two of the jurors. The grand jury at that time was investigating allegations made in affidavits supporting the third motion for a new trial in the Hoffa case (Tr. 299) that United States marshals had furnished prostitutes for some of the Hoffa case jurors while the jurors were sequestered in the hotel. See *United States* v. *Hoffa*, 382 F.2d 856, 861-862 (C.A. 6), certiorari denied, 390 U.S. 924. Petitioner was one of the affiants who said that she had been procured by the marshals.

At the instant trial, the two Hoffa case jurors denied any misconduct, testifying that the only time they had seen petitioner was during the grand jury proceedings (Tr. 285-286, 327-328). The deputy marshal also denied petitioner's accusation, stating that he first saw petitioner at her trial (Tr. 262-265). The government also introduced evidence of the strict security arrangements which had been established and followed by the marshals to keep the jury completely isolated on the top floor of the hotel where they were housed during the Hoffa trial (see, *e.g.*, Tr. 143-152).

An F.B.I. agent testified that he interviewed petitioner at the home of one of her friends in April 1966, about eleven months before the return of the indictment. He warned her of her rights to keep

silent and to consult an attorney (Tr. 306-309). Petitioner said she would not have testified as she did before the grand jury if it were not true; that she was sorry that she got "tied up to this thing," and that she was prepared to face the consequences of her actions. When informed that she could still correct any error in her statements, she replied that she knew about the penalties for perjury (Tr. 310-311).

ARGUMENT

1. Before trial, petitioner moved for pre-trial discovery of various documents and writings, including a transcript of the proceedings before the grand jury. Her motion specifically mentioned the grand jury testimony of the two jurors with whom she had said she had sexual relations. The district court provided her with a copy of her own grand jury testimony, but declined to turn over, prior to trial, any other portions of the grand jury proceedings. The court stated that disclosure of testimony "may properly be obtained only upon a showing of 'particularized need' and then in a manner consistent with the Jencks Act" (Pet. App. 26-27; see Pet. App. 47-48). At trial, after the two jurors testified, no request was made by petitioner for the transcript of their grand jury testimony.

The courts below properly held that petitioner had made no showing of any "particularized need" for the grand jury testimony of the two witnesses., *E.g.*, *United States* v. *Procter & Gamble*, 356 U.S. 677, 683. There is, indeed, a serious question as to the extent to which grand jury testimony (other than that of the defendant) is subject at all to pre-trial

discovery. See *United States, et al.* v. *Gifford-Hill-American, Inc.*, No. 515, this Term, in which the government has filed a petition for a writ of certiorari to review a ruling of the Court of Appeals for the Fifth Circuit (413 F.2d 1244) that such minutes are subject to discovery under Rule 16(b), F. R. Crim. P. No court has, however, held that pre-trial discovery is available as a matter of course without showing a need for such testimony.[1] *Dennis* v. *United States*, 384 U.S. 855, and decisions stemming therefrom, on which petitioner (Pet. 8-9) and the court of appeals' dissent (Pet. App. 33-35) seek to rely, relate to the production of minutes after a witness has testified at trial, and are thus inapposite here.

In short, petitioner has never made a showing as to how testimony by the Hoffa jurors denying her accusations (a denial implicit in the return of the indictment) could possibly have aided in the preparation of her defense. And, as noted above, no request was ever made at trial for production of their grand jury testimony for possible use in attempting to impeach those witnesses.

2. The transcript of proceedings involving petitioner's appearance before the grand jury was received into evidence without objection as Government Exhibit 2 (Tr. 130). As noted by the district court, the first 41 pages of the 372-page transcript contained

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[1] See *James* v. *United States*, decided by the Fifth Circuit (No. 26162) on September 17, 1969, and presently pending on petition for a writ of certiorari, No. 746, this Term, in which its earlier decision is interpreted as having been based on a showing of particularized need.

the refusal of petitioner to answer questions on self-incrimination grounds, and pages 42 through 130 were the record of the proceedings under which she was granted immunity (Pet. App. 59-60).

During the trial, government counsel read the portion of the transcript in which petitioner had testified that she had sexual relations with jurors Link and Curbow on the tenth floor of the hotel after a deputy marshal had brought her there (Tr. 131-137). In closing argument, defense counsel read a portion of the transcript in which petitioner had testified that she also had relations with juror Bonner. The defense argued that since the government did not prosecute petitioner with respect to her testimony concerning Bonner, it knew that her testimony was true (Tr. 562-565). The government, in response, referred to other grand jury testimony of petitioner in which she stated that she did not remember whether she had relations with Bonner (Tr. 584). The government also read petitioner's testimony in which she had testified that a bellboy, one Seymour Ball, had called her to come to the hotel; that she had met him on the eighth floor and that he had introduced her to the marshal; that subsequently the marshal walked her back to the eighth floor where she met Ball who gave her $20 and led her out. The government pointed out that Seymour Ball had not testified at the trial (Tr. 586-590).

Before the jury retired for its deliberations, the trial court, in response to a defense request that the jury be permitted to take Government Exhibit 2 with it, advised the jury that it would not require it to

take any portion of the record, but that "it will be up to the jury as to what their request may be in that respect" (Tr. 611). Subsequently, there was communicated to the judge a request by a juror for the testimony of petitioner before the grand jury (Tr. 621). The judge called the jury back and informed them that the request should be in writing. The foreman stated that "one of the gentlemen has requested the copy of the testimony of the defendant given to the grand jury"; the court reserved a ruling on the request (Tr. 622-623).

Outside the presence of the jury, the trial judge expressed the opinion that the portion of the testimony which was read into the record during trial would be proper for submission to the jury, but not other portions of the transcript. He said that if the reporter would provide the court with the portion read into evidence, this would be made available to the jury (Tr. 624). Defense counsel noted the fact that both he and government counsel had referred to portions of the transcript in their argument (Tr. 625). The court, however, took the position that matters not read into the record were not presented to the jury and thus did not constitute matters they could properly consider (Tr. 626, 630). Subsequently, the jury submitted a written request for petitioner's "deposition" (Tr. 635). When called back by the court, to clarify their request, the foreman stated they "would like to have that part of the information as to how she got in and out of the tenth floor" (Tr. 641). Defense counsel took the position that the entire transcript should be made available

(Tr. 647). The court decided not to comply with the request (Tr. 647). It had already told the jury to consider "only the evidence that was introduced to the jury for consideration by the jury" (Tr. 641).

The trial judge was clearly justified in not submitting the entire transcript to the jury, even though it had formally been introduced into evidence as an exhibit. That it contained irrelevant material is manifested by the fact that both sides referred to only small portions of the 372-page document. The judge could legitimately feel that the jury should not be encouraged to consider material, much of it wholly irrelevant to the perjury prosecution, on which neither counsel had seen fit to elucidate. It may have been erroneous to receive the entire transcript in evidence without specification of the relevant portions, but the judge properly minimized that error, and indeed rendered it harmless, by not sending the whole document to the jury. Insofar as the final communication narrowed the request to a portion of the transcript read by the prosecutor in summation, but not introduced in evidence, petitioner is hardly in a position to complain that the elimination of this material from the jury's consideration was prejudicial to her. The judge made it clear to the jury that they were to consider only the matters actually read into the record during the trial. The issue in the case did not turn on any particular answer to a specific question, but rather on the broad question whether petitioner had lied when she told the grand jury that she had sexual relations with two of the jurors (Tr. 120, 551).

3. Petitioner's statement to the F.B.I. agent was properly received in evidence. Although she was not in custody at the time, she was fully warned of her rights to silence and to consult an attorney. Since petitioner was not under indictment at the time, it was not improper for the government agent to speak with her. Unlike the situation in *Massiah* v. *United States*, 377 U.S. 201, upon which petitioner relies (Pet. 12), there was neither a surreptitious interview after indictment or a denial of the right to consult with counsel in the instant case.

4. Petitioner argues that, since she was granted immunity under the Federal Communications Act (47 U.S.C. 409 (*l*)), she cannot be prosecuted for giving false testimony as to matters not relevant to a violation of the Communications Act. This contention is unsound. The immunity which petitioner required was not limited to immunity from prosecution under the Communications Act, but was a complete immunity from all prosecution related to her testimony. Her obligation was thus to testify truthfully before the grand jury as to any matter relevant to its inquiry. The test of materiality is whether the false testimony is capable of influencing any part of the investigation of the grand jury. See *Barnes* v. *United States*, 378 F. 2d 646, 649 (C.A. 5), certiorari denied, 389 U.S. 917.

The argument that petitioner was illegally compelled to testify before the grand jury was properly rejected by the district court prior to her appearance at the grand jury proceedings. The court found that the grand jury was engaged, *inter alia*, in a good

faith investigation to determine whether the Communications Act had been violated, and also found that petitioner would be immune from prosecution if she answered the questions propounded by the grand jury honestly. If petitioner thought that the court was wrong in its ruling, she could have, like any other witness who claims a privilege not to answer, tested this refusal in a contempt proceeding. See, *e.g.*, *In re Grand Jury Investigation of Giancana*, 352 F. 2d 921 (C.A. 7), certiorari denied, 382 U.S. 959. In no event, as the court below found, did petitioner have a license to commit perjury. See generally the government's brief in *United States* v. *Knox*, No. 17, this Term.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be denied.

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NOVEMBER 1969.

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[2] The speculative statement in the dissent that the grant of immunity was a procedural device "to obtain cross-examination of this young woman before formal accusation of her would foreclose such activity" (Pet. App. 30), is unfounded. The grand jury was properly investigating all the circumstances and persons involved in obtaining the false affidavit. Moreover, immunity was granted to the witness for the usual reason—she claimed that her answers to the questions propounded would have incriminated her.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 732.

CATHERINE JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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Respondent.

PETITION FOR REHEARING

Petitioner, Catherine Johnson, respectfully prays that, pursuant to paragraph 2 of Rule 58 of the Revised Rules of this Court, a rehearing be granted of the order of this Court, entered in this case on March 23, 1970, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The reasons for this Petition for Rehearing, hereinafter stated, are confined to substantial and controlling intervening circumstances and grounds not previously presented.

QUESTIONS PRESENTED.

Whether Rule 16 of the Federal Rules of Criminal Procedure requires a United States District Court upon timely pretrial motion by a defendant charged with perjury to grant her attorney access to the grand jury testimony of the persons whose grand jury testimony brought about the indictment, without the showing of a particularized need heretofore required under Rule 6(e).

RULES INVOLVED.

Rules 6(e) and 16(b) of the Federal Rules of Criminal Procedure provide, in relevant part, as follows:

6(e): *Secrecy of Proceedings and Disclosure*:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. * * *

16(b): *Other Books, Papers, Documents, Tangible Objects or Places*:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable.

STATEMENT OF THE CASE.

The statement here will be confined to facts essential to the question raised in this Petition for Rehearing.

On January 24, 1966, Petitioner was subpoenaed before a grand jury and interrogated with respect to her affidavit filed in the case of *United States v. James R. Hoffa*, in which affidavit Petitioner claimed that she had engaged in acts of sexual intercourse with certain members of the sequestered Hoffa jury during the Hoffa trial.

After she claimed her Fifth Amendment right to decline to testify, she was granted immunity and ordered to testify by Chief Judge Taylor (R. 124-125). Petitioner then testified to sexual relations with members of the Hoffa jury (Jurors Link, Curbow and Bonner). She was later charged in a one count indictment that such testimony was perjurious (18 U.S.C. 1621).

Counsel seasonably sought to procure her grand jury testimony, and the grand jury testimony of the jurors Petitioner had identified as those persons with whom she had had sexual intercourse. The motion was granted by the District Court as to Petitioner's grand jury testimony. But the Court denied Petitioner's motion to provide her with the grand jury testimony of jurors Bonner, Link and Curbow; although the indictment specifically stated that the perjury with which Petitioner was charged was that she had falsely testified before the grand jury that she had had sexual relations with Link and Curbow.

REASONS FOR GRANTING THIS PETITION FOR REHEARING.

The question raised by this Petition for Rehearing was not raised in the petition for certiorari, i.e. whether under Rule 16 the grand jury testimony of her accusers should have been made available to her counsel under Rule 16(b). The same issue was before this Court in *United States v. Gifford Hill American, Inc.*, No. 515 this term; certiorari there was granted, but the case later dismissed as moot when pleas of nolo contendere were accepted by the District Court post grant of certiorari. In *Gifford Hill* the Fifth Circuit found that Rule 16 dispenses with the requirement of particularized need (Pet. No. 515, App. A, p. 38) and that the Rule compels grant of a de-

fendant's motion for "(g)rand (j)ury transcripts are 'documents.' *Cf. Fryer v. United States*, 207 F.2d 134, 136-37 (D.C. Cir. 1953)." Pet. No. 515, App. pp. 41-42. In seeking certiorari there, the Solicitor General admitted that if the rule enunciated by the Fifth Circuit was correct, the particularized need test would "have no further application to discovery of grand jury transcripts" but that henceforth grand jury transcripts are to be made available under the less exacting standard of materiality under Rule 16(b). It is clear beyond question that the Link-Curbow testimony was material here. (See Pet. this case, No. 732, App. p. 32, Judge O'Sullivan dissenting. Petitioner's application for rehearing en banc was denied by an equally divided court four to four.)

In asking that the case be dismissed as moot the Solicitor General in *Gifford Hill* (No. 515, memorandum suggesting mootness p. 2), said, "* * * the questions presented here are likely to recur in future cases * * *." That fact is evident. At least one District Court and one Appellate Circuit now consider that Rule 16 requires the disclosure of "material" grand jury testimony to a timely moving defendant, without a showing of "particularized need." The question will recur until settled by this Court. The case at bar offers a peculiarly appropriate one to determine the issue.

CONCLUSION.

For all of the above reasons advanced, the Petition for Rehearing should be granted.

Respectfully submitted,

MOSES KRISLOV,
JOHN S. MCLELLAN,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

Pursuant to the requirements of Rule 58(2) of the Revised Rules of the United States Supreme Court, the undersigned, counsel for Petitioner, Catherine Johnson, certify that this petition for rehearing is presented to this Court in good faith and not for purposes of delay and is restricted to those grounds specified in said rule.

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